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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

KARL L. DAHLSTROM, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a prosecution of promoters of an unlawful "tax shelter" program, the absence of a prior statute, regulation, or court decision directly establishing the illegality of the scheme precludes a finding of willfulness as a matter of law.

2. Whether the First Amendment bars prosecution of persons who advise and assist in structuring of sham transactions and preparation of false and fraudulent tax returns, on the ground that the returns were not filed immediately after the advice and assistance were given.

PARTIES TO THIS PROCEEDING

In addition to the parties shown in the caption, Hiram E. Conley, R. Bruce Ripley, David J. Morris, and Gaze Durst were appellants below and are respondents herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App., *infra*, 1a-18a) is reported at 713 F.2d 1423.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1983. A petition for rehearing was denied on November 8, 1983 (App., *infra*, 19a). On December 30, 1983, Justice Rehnquist extended the time in which to file a petition for a writ of cer-

tiorari to and including February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> § 7206. Fraud and false statements
> Any person who—
>
> * * * * *
>
> Aid or assistance
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondents Karl L. Dahlstrom, Hiram E. Conley,

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[1] Section 7206(2) has since been amended to provide for fines of up to $100,000 (and $500,000 in the case of corporations). Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 329(c), 96 Stat. 618.

R. Bruce Ripley, David J. Morris, and Gaze Durst were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Each was also convicted on one or more counts of willfully aiding or assisting in, or procuring, counseling, or advising the preparation or presentation of a tax return or other document that is false or fraudulent as to any material matter, in violation of Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.). The district court sentenced respondents to various terms of imprisonment on the conspiracy count [2] and to concurrent terms of five years' probation on each of the substantive counts on which they were convicted, to commence upon release from custody. The court also imposed fines on Dahlstrom, Ripley, and Conley. (Tr. 4404-4407).

1. The evidence at trial showed that respondents promoted and sold a "tax shelter" program in which participants used a series of sham transactions and "gifts" to create inflated or entirely fictitious income tax deductions (Tr. 976-978, 1015-1016, 1019-1021, 3339, 3342-3343, 3345-3347, 3408, 3410). Sales of the program took the form of sales of membership in an organization formed by respondent Dahlstrom in 1974, the American Law Association (ALA) (Tr. 3021, 3339-3340, 3342).[3] As "members" of the ALA,

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[2] The prison terms imposed were as follows: Dahlstrom, five years; Ripley, four years; Conley, three years; Morris, eighteen months; and Durst, one year (Tr. 4404-4407).

[3] Although the ALA was nominally a membership organization, it was controlled by Dahlstrom. He was trustee of a trust organization which, in turn, was trustee of the ALA (Tr. 3421-3422). Ripley served as executive vice-president of the ALA (Tr. 3422-3423). Dahlstrom formed the ALA in order not to run afoul of laws prohibiting the practice of law without a license (Tr. 3021).

program purchasers were entitled to receive instruction and materials relating to the "tax shelter" program, conveyed at ALA two-day "seminars" (Tr. 1344-1348, 1388-1394, 1543-1548, 1665-1677, 1693, 1698, 1700-1701, 1798-1801, 1841-1846, 1854-1855, 2098-2099, 2101-2105, 2228-2229, 2253, 2261, 2266, 3023, 3111-3112, 3296-3297, 3351-3352, 3365-3367, 3524-3533, 3538-3540, 3558). "Membership fees" ranged from approximately $3,000-$6,000 in late 1976 to $12,000 in 1978 (Tr. 502, 772, 983, 1040, 1345-1346, 1545, 1666-1667, 1799, 1841, 2098, 2261, 3340). A member's fee payment was refundable if he was not satisfied with the program (Tr. 1841, 2099).

The "tax shelter" scheme was conceptually quite simple. Taxpayer participants would establish and retain control of a series of trusts. They would make payments to one of the trusts for purported materials or services. The payments would then be shifted among the trusts through paper transactions, at the conclusion of which one of the trusts would make a "gift" or "loan" back to the taxpayer of all or a large portion of the original payment. The taxpayer treated these payments to the trust as tax deductible business expenses; he treated the "gift" or "loan" as tax-free. The transactions, taken as a whole, had no economic substance; their sole purpose and effect was to generate phony tax deductions for the participants.

The particular version of this scheme promoted by respondents employed foreign trusts as the vehicle for carrying out the transactions and reducing the risk of detection by the Internal Revenue Service. The program participants would cause at least three common law trusts to be created in a foreign country

by a citizen of that country (Tr. 504-506, 774-781, 1052-1055, 1068-1083, 1548-1557, 1687-1693, 1801, 1806-1810, 1859-1871, 2103-2114, 2277-2281). Respondents would sometimes assist in setting up the trusts (Tr. 774-781, 790, 1052, 1858-1860, 2105-2107, 2277-2285). In general, the program participant himself, or a related person, would be named trustee of one of the trusts (trust number one) (Tr. 724, 1072, 1074, 1553-1554, 1692, 1808, 1861-1864, 2106-2107, 2272). Trust number one would, in turn, be named trustee of the other two trusts (trust number two and trust number three) (Tr. 1072, 1555-1557, 2109-2114, 2272; GXs 118-121, 178, 179, 180, 181, 182). Under this arrangement, the person implementing the "tax shelter" program or a related person would be in complete control of the affairs of all three trust organizations (see, *e.g.*, Tr. 1083-1112, 1558-1573, 1576, 1580-1585, 1704-1705, 1707-1708, 1710-1711, 1713-1715, 1884-1898).

Once established, these foreign trusts were used as described above. Dahlstrom or others conducting seminars advised the participants to make payments to trust number two for purported business expenses, and then to claim an income tax deduction for the full amounts (Tr. 1053-1057, 1083, 1085-1089, 1113, 1546-1547, 2275-2277, 3525-3530). After a series of prearranged transactions involving trusts two and three,[4] these amounts would ultimately be returned, in whole or in part, to the taxpayer as a so-called "gift" or "loan" from one of the trusts (Tr. 1393, 1581-

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[4] United States tax liability on the "income" to trust two from the payments from the taxpayer would be avoided by causing trust two to make payments to trust three. These payments would not give rise to United States tax liability because both trusts were non-resident aliens for tax purposes. App., *infra*, 4a.

1585, 1890-1898, 2123-2124, 2272, 3215-3217, 3233-3239).[5]

For example, James Murphy, one of the participants in the program, purported to purchase from his trust number two, for $66,000, "tax shelter" materials he had previously received from the ALA.[6] Although Murphy caused the entire $66,000 purchase price to be returned to him as a "gift" from trust number three, and he therefore incurred no real expense, he claimed the $66,000 "purchase" as a deduction on his income tax return for 1978. This was in accordance with advice he received from respondent Dahlstrom. Tr. 1050-1051, 1053-1055, 1068, 1094-1111, 1113; GX 1.

In another typical transaction, based on advice from an ALA seminar and respondent Morris, purchaser James Ira Howlett, a chiropractor, transferred a clinic building and his equipment to two number two trusts (Tr. 1837, 1866, 1872, 1878, 1881, 1898, 1908). He then made purported rental payments to these trust organizations and claimed income tax deductions amounting to $39,600 for 1979 with respect to the "payments" (Tr. 1881-1882, 1884-1887, 1907-1908). However, more than $21,000 of the "payments" ultimately returned to Howlett as "gifts" during 1979 (Tr. 1878-1879, 1888-1898).

In addition to counseling program participants to set up foreign trust organizations and claim false tax

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[5] The "gifts" or "loans" would generally take the form of a transfer from trust three to the taxpayer participant of a demand note payable by trust two. App., *infra*, 4a. There is no gift tax payable on gifts of intangible property by a nonresident alien to a United States citizen. 26 U.S.C. (& Supp. V) 2501.

[6] The record does not reveal how the materials were purportedly acquired by the trust.

deductions, respondents also counseled them to employ various methods for avoiding detection by the IRS. Respondent Morris provided participant Howlett false employer identification numbers to be used in connection with trust bank accounts (Tr. 1874-1877). Respondent Durst recommended that John Wilbur Ricketts set up additional trusts to make future transactions more difficult for the IRS to trace (GX 246, at 67-69). Respondents Ripley and Durst recommended that "tax shelter" purchasers use blue "copy-not" pens to sign checks, so that they would not be readable on any bank microfilm records that might be obtained by the IRS (Tr. 1686-1687; GX 246, at 85-92). Respondent Morris told Dr. Howard Bean to use specified fictitious names as the authorized signatures on bank accounts opened for his trusts, and accompanied Bean when he implemented this advice (Tr. 799-800, 804-809).

Respondent Durst counseled an IRS Special Agent posing as a participant's financial advisor that altering social security numbers on trust bank accounts was "another good thing to do * * * because * * * [without a social security number] there's no way the IRS will ever tie anything into you on any check over $10,000" (GX 246, at 94). Durst also warned the special agent, "If they get a hold of your books and records, they could probably shoot holes in this thing. * * * Yeah. If they do, you're in trouble" (GX 243B, at 23). He further stated that if the IRS obtained access to the participant's books and records, "Then you're talking about tax avoidance, tax fraud, and the whole thing" (GX 243B, at 26).[7]

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[7] Respondents also provided program purchasers with materials explaining the principle that the incidence of taxation

The evidence showed that purchasers of the ALA program were required to sign an ALA membership affidavit (see GX 212) stating that the member concerned did not work for a federal or state government, was not investigating respondents, and would not aid any government agency in any civil, criminal, or administrative action against respondents or the ALA. The affidavit also stated that the member would not divulge to any government agency any information concerning his relationship with respondents.

2. A divided panel of the Ninth Circuit reversed the convictions. The court held that the evidence was insufficient to establish that respondents had acted willfully. Citing *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the court also held that respondents' promotion of their "tax shelter" program was protected by the First Amendment because the actual filing of the fraudulent returns was not "imminent" at the time respondents counseled such action.[8] The court did not question the sufficiency of the evidence that respondents had aided or assisted in the preparation of false and fraudulent tax returns. Nor did the court question the adequacy of the evidence that respondents actually believed that their scheme was false and fraudulent. However, noting that no prior decision had invalidated the foreign trust organiza-

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is determined by the substance, rather than the form, of the transaction (*e.g.*, GX 304, at 86-90 of syllabus).

[8] The court also held that an additional reason for reversing the convictions on Count VII was that a false income tax return prepared by respondent Durst for a government informer was never actually filed as the informer's income tax return (App., *infra*, 11a-12a). Although we consider that ruling erroneous (see App., *infra*, 17a (dissenting opinion)), we are not seeking review of it by this Court.

tions involved in this case,[9] the court concluded that respondents could not possess the specific intent to violate Section 7206. App., *infra*, 8a-10a. The court also held that the insufficiency of the evidence of willfulness as to the substantive counts invalidated respondents' convictions on the conspiracy count as well (*id.* at 12a-13a).

Judge Goodwin, dissenting, reviewed the proof in the case and concluded: "There could hardly be any clearer evidence that the defendants in this case knew that what they were advising and assisting clients to do was patently illegal" (App., *infra*, 15a). He also rejected the majority's reliance on the First Amendment (*id.* at 18a).

REASONS FOR GRANTING THE PETITION

1. Schemes for fraudulent tax evasion are as numerous as human ingenuity can devise. Most—like the scheme involved here—are but variations on established themes. Like the jazz musician improvising on a popular tune, the tax evasion artist adapts the basic elements of the sham transaction to the needs and mood of the day, adding a twist here or a grace note there to maximize gain or reduce the risk of detection.

There is no doubt that respondents' "tax shelter" program was illegal, and the government's evidence in this case clearly established that respondents knew and understood that it was illegal. Legitimate tax advisers do not advocate that their clients write their checks with "copy-not" pens, so that bank microfilms will not be readable by the IRS. They do not provide false social security numbers to prevent the IRS

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[9] Similar schemes have since been held to be invalid for tax purposes. *United States* v. *Landsberger*, 692 F.2d 501 (8th Cir. 1982); *Zmuda* v. *Commissioner*, 79 T.C. 714 (1982), appeal pending, No. 83-7374 (9th Cir. filed May 23, 1983).

from "ever tie[ing] anything into you" ([GX 246, at 94). They do not suggest fictitious names for authorized signatures on bank accounts. They do not require their clients to sign an affidavit forswearing any cooperation with tax authorities that may be investigating them. They do not advise their clients that disclosure of their books and records to the IRS would lead to prosecution for "tax avoidance, tax fraud, and the whole thing" (GX 243B, at 26). When they do these things—as the evidence here proves respondents did—the jury cannot be faulted for finding that they believed their scheme to be unlawful, and thus that they acted willfully.

The court of appeals held, however, that a defendant does not willfully counsel and assist in the preparation of false and fraudulent tax returns if the scheme he promotes has not yet been invalidated under "clearly relevant precedent" (App., *infra*, 9a). According to the court, it does not matter whether the defendant has manifested an intent to assist in defrauding the government; the absence of a prior "statute, regulation, or court decision" in point precludes criminal prosecution (*id.* at 13a). The court thus effectively removed the threat of criminal liability from any tax evasion counselor creative enough to devise an as-yet-unchallenged variety of tax fraud. The result here was to overturn the convictions of five individuals who counseled and assisted in the preparation of false and fraudulent tax returns, and who plainly believed at the time that their tax evasion scheme was unlawful. We submit that the court of appeals erred, and that the decision represents a severe blow to the ability to enforce the tax laws effectively. Review of the decision by this Court is therefore entirely warranted.

a. The court's holding that the absence of a statute, regulation, or court decision directly on point pre-

cludes prosecution under Section 7206(2) is unworkable in practice and erroneous as a matter of law. It is far too easy for promoters of tax evasion programs to devise a new scheme, not yet anticipated by the IRS or litigated in court. It should suffice to prove that the promoters' program was fraudulent and that the promoters recognized that it was fraudulent; to require the existence of an advance ruling would cripple law enforcement. Accordingly, the courts have frequently sustained criminal tax prosecutions based on the general concept of sham transactions, provided there is evidence of actual fraudulent intent. See, *e.g.*, *United States* v. *Baskes*, 687 F.2d 165 (7th Cir. 1981); *United States* v. *Conforte*, 624 F.2d 869, 873-875 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *United States* v. *Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Clardy*, 612 F.2d 1139, 1151-1153 (9th Cir. 1980); *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1068 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Raub*, 177 F.2d 312, 313-314 (7th Cir. 1949).

Willfulness under Section 7206(2) depends not on whether the IRS and the courts have had the chance to rule authoritatively on a particular scheme. It depends on whether the scheme was in fact unlawful and whether the defendant believed the scheme was unlawful. The court of appeals' contrary holding simply invites fraud and puts a premium on criminal ingenuity.

The scienter requirement of the offenses involved in tax crimes—willfulness—"relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); see *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952); *United States* v. *Ragen*, 314 U.S. 513, 524

(1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941); *Hygrade Products Co.* v. *Sherman*, 266 U.S. 497, 502-503 (1925). As this Court stated in *United States* v. *Bishop*, 412 U.S. 346, 361 (1973), the willfulness requirement of Section 7206 is intended to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."

Willfulness is thus a question of subjective intent. The issue is the defendant's own state of mind, not the objective certainty or uncertainty of the law. See *United States* v. *Herzog*, 632 F.2d 469, 473 (5th Cir. 1980). To turn it about, as the court of appeals did, and say that uncertainties about the application of the law preclude prosecution even of those who clearly knew they were committing, and intended to commit, a violation, is to ignore the very purpose of the requirement of specific intent. *Boyce Motor Lines*, 342 U.S. at 342; *Screws*, 325 U.S. at 102-103. As Justice Brandeis said for the Court concerning a similar contention over 65 years ago, "any danger to [potential violators] which might otherwise arise from indefiniteness, is removed by [the statute's scienter requirement]." *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918). The principle still holds today. See *Colautti* v. *Franklin*, 439 U.S. 379, 395 & n.13 (1979).[10]

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[10] We can agree that in some circumstances a criminal prosecution would violate due process because the law is so vague that it fails to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir. 1983), cert. denied, No. 82-1526 (June 20, 1983). The court of appeals reached no such conclusion here. The court held that respondents' conduct was not willful—not that Section 7206(2) is unconstitutionally vague. In any event, where proof of willfulness is required to sustain a conviction, we

Practical considerations of legislative draftsmanship compel this conclusion. As this Court observed in *Boyce Motor Lines*, 342 U.S. at 340 (footnote omitted):

> [M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

These "practical necessities" are as compelling in the context of the tax laws as in any other. *Bishop*, 412 U.S. at 360-361.

Of course, in a prosecution under Section 7206(2) defendants are entitled to present evidence to show that they did not believe that their actions were unlawful, and therefore did not act willfully. Such evidence may take many forms (see *United States* v. *Brown*, 411 F.2d 1134, 1137 (10th Cir. 1969)), but its purpose is always to show their *actual state of mind*. Respondents had this opportunity, but the jury did not decide in their favor. See *United States* v. *Pomponio*, 563 F.2d 659, 662 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978). The court of appeals erred in concluding that the existence of some objective uncertainty in the law negates criminal intent, where the respondents themselves were shown to be-

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believe due process requirements of definiteness are usually satisfied. *Boyce Motor Lines*, 342 U.S. at 340; *United States* v. *McClain*, 545 F.2d 988, 1001-1002 n.30 (5th Cir. 1977). See *United States* v. *Ragen*, 314 U.S. at 524 ("A mind intent upon willful evasion is inconsistent with surprised innocence."); cf. *Lambert* v. *California*, 355 U.S. 225 (1957).

lieve that the actions they counseled were unlawful. *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir. 1983), cert. denied, No. 82-1526 (June 20, 1983).[11]

Here, the jury heard ample evidence concerning respondents' efforts to assist participants in concealing their transactions. The jury also learned that respondents informed the participants of the very principle of tax law—substance over form—violated by their scheme, and that respondent Durst had told a participant that if the IRS were to discover his books and records, "then you're talking about tax avoidance, tax fraud, and the whole thing" (GX 243B, at 26). This provides a sufficient basis for concluding that respondents' violation of the law was willful. *Holland* v. *United States*, 348 U.S. 121 (1954); *Spies* v. *United States*, 317 U.S. 492, 499 (1943); *United States* v. *Kaatz*, 705 F.2d 1237, 1246 (10th Cir. 1983); *United States* v. *Scott*, 660 F.2d 1145, 1160 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *United States* v. *Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981); *United States* v. *Tunnell*, 481 F.2d 149, 152 (5th Cir. 1973), cert. denied, 415 U.S. 948 (1974); *Greenberg* v. *United States*, 295 F.2d 903, 907 (1st Cir. 1961); see *Moore* v. *Commissioner*, 619 F.2d 619 (6th Cir. 1980). The issues of uncertainty in the law raised by respondents, as in *Pomponio*, 563 F.2d at 662, "constitute no more than defenses which were rejected by the jury." The court of appeals invaded the province of the jury in hold-

[11] Conversely, it may be well settled as a legal matter that a certain tax treatment of a transaction is unlawful, yet a defendant in a criminal case would have a valid defense if the jury found that—however erroneously as a matter of objective fact—he actually believed his course of action to be proper. See, *e.g.*, *Mann* v. *United States*, 319 F.2d 404, 409 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964).

ing, on this record, that respondents' conduct could not as a matter of law be found to have been "willful."

b. The decision below squarely conflicts with *Ingredient Technology Corp.* In that case, the Second Circuit rejected the theory that "uncertainty in the law negates willfulness whether or not the defendants are actually confused about the extent of their tax liability" (698 F.2d at 97). The court stated that "prior cases on willfulness consistently require factual evidence of the defendants' state of mind to negate willfulness under any theory" (*ibid.*). There, as here, "there was no evidence that [the defendants] * * * genuinely thought that what they were doing was lawful and proper; on the contrary, their conduct indicated a subjective belief in the *un*lawfulness of the conduct" (*ibid.* (emphasis in original)).[12]

For its contrary holding, the court of appeals relied (App., *infra*, 9a) on *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974), and *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). Those decisions, however, are factually distinguishable in material respects and provide only slight support for the court of appeals' reasoning.

In *Critzer*, the defendant, an Eastern Cherokee Indian, had been advised by the Bureau of Indian Affairs that her income in question was not taxable. Indeed, the Bureau continued to maintain that position at the time of trial. The Fourth Circuit held that "[a]s a matter of law, defendant cannot be

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[12] The *Ingredient Technology* court also rejected the notion that a criminal tax statute could be unconstitutionally vague merely because " 'there is no litigated fact pattern precisely in point.' " 698 F.2d at 96 (quoting *United States* v. *Brown*, 555 F.2d 336, 339-340 (2d Cir. 1977)).

guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions" (498 F.2d at 1162).

We have little objection to the narrow holding of *Critzer*—that a taxpayer should not be found to have acted willfully if she relied on advice from a responsible agency of the federal government—especially under the facts of the case, which involved an Indian and the agency of the federal government charged with looking after her affairs. This narrow holding has no application to the instant case, however, because here there is no conflict between government agencies and no evidence that respondents relied on statements or positions of the government.

We take issue with the broader dicta of *Critzer*, that in a case of legal uncertainty the "defendant's actual intent is irrelevant" (498 F.2d at 1162), and that "when the law is vague or highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it" (*ibid.* (quoted at App., *infra*, 9a)). On the contrary, the issue of intent is one of fact, to be decided by the jury. *Morissette* v. *United States*, 342 U.S. 246 (1952). Where, as here, there is ample evidence that the defendants had the requisite intent to violate the law, and there was no evidence of reliance on government positions, the purely legal issues concerning the uncertainty of the law do not preclude conviction.

In *Garber*, the Fifth Circuit held that, where there is sufficient uncertainty in the law, the trial court must allow the defendant to introduce expert testimony on that uncertainty, and must instruct the jury that a reasonable misconception of the tax law on

his part would negate the necessary intent.[13] Unlike the court below, the *Garber* court did not hold that the perceived legal uncertainty was a bar to conviction; on the contrary, it remanded for retrial with the expert evidence and revised jury instructions, thereby leaving the question of willfulness within the province of the jury. 607 F.2d at 100.

Garber thus does not support, but rather conflicts with, the result below. Respondents were permitted to introduce expert testimony concerning the purported uncertainty in the law (see Tr. 3784-3823, 3832-3869, 3878-3941),[14] and the trial court properly instructed the jury that respondents could not be found guilty if they had a good faith belief in the lawfulness of their tax program (R. 341, Instruction 29). The jury nonetheless found respondents guilty of willful violations of Section 7206(2). Respondents' convictions were fully consistent with the Fifth Circuit's position in *Garber*.

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[13] The Fifth Circuit has subsequently narrowed the application of *Garber* to cases involving failure to report income, and has refused to apply it to a case of filing false information. *United States* v. *Herzog*, 632 F.2d 469, 473 (1980). The court reasoned that "no amount of expert testimony could help" a defendant who filed falsely (*ibid.*).

[14] We do not agree with the *Garber* court (607 F.2d at 98) that proof of uncertainty in the law is relevant where the defendant was not aware of the uncertainty. In our view, the ultimate issue is the defendant's subjective intent; the objective state of the law is not ordinarily probative of that intent. See *id.* at 113 (Tjoflat, J., dissenting). To the limited extent that proof of uncertainty in the law might add credence to the defendant's own claim of subjective good faith, its relevance is likely to be outweighed by the dangers of prejudice and confusion (*ibid.*). Because expert testimony was admitted in this case, however, the issue is not presented.

In *Critzer*, the court relied heavily on *James* v. *United States*, 366 U.S. 213 (1961), in which this Court reviewed a conviction for failing to report income from embezzled funds. In an earlier decision, *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), the Court had held that embezzled funds did not constitute taxable income to the embezzler. In *James*, the Court overruled *Wilcox* but nonetheless reversed the conviction. A three-justice plurality held that "the element of willfulness could not be proven in a criminal prosecution" in light of the prior inconsistent holding in *Wilcox*. 336 U.S. at 221-222.

The *Critzer* court concluded from *James* that "when the law is vague or highly debatable, a defendant * * * lacks the requisite intent to violate it" (498 F.2d at 1162). We do not believe this sweeping conclusion can be appropriately drawn from the rather unusual circumstances of *James*. In *James*, the three dissenting justices concluded that the permissibility of retrial of the defendants depended on their actual reliance, if any, on *Wilcox* (366 U.S. at 241, 242-243). The three concurring justices, who dissented on the question of overruling *Wilcox*, necessarily agreed with the plurality that the conviction should be reversed, but two of them—Justices Black and Douglas—criticized the plurality's decision to make its holding prospective only.[15] Only the three justices in the plurality

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[15] The concurring and dissenting opinion of Justices Black and Douglas in *James* has been a source of some confusion. We believe that the opinion states: (1) that the willfulness requirement was satisfied in *James* despite the legal uncertainty (366 U.S. at 223); (2) that the Court could not legitimately apply interpretations of criminal statutes prospectively (*id.* at 225); and (3) that a statute so ambiguous that interpretation of it brings about unexpected results raises serious questions of unconstitutional vagueness (*id.* at 224). Con-

subscribed to the statement relied on in *Critzer*. Moreover, this Court subsequently characterized *James* as holding merely that "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer *has relied in good faith* on a prior decision of this Court" (*Bishop*, 412 U.S. at 361 (emphasis added)). Thus, *James* cannot properly be read to stand for a constitutional rule that would preclude prosecution of defendants evincing the requisite mens rea and committing acts illegal in fact simply because there may have been some objective uncertainty about the illegality of their actions.

In any event, *James* is a far cry from the instant case. We can agree there is some unfairness in punishing conduct that was expressly upheld by governing Supreme Court precedent at the time it was engaged in. We do not think there is any unfairness in convicting persons who acted both unlawfully and willfully, and in a manner not theretofore held lawful by any court or agency, where their sole substantiated claim is that no case directly in point had yet actually invalidated the specifics of their scheme.

c. The court of appeals' decision is particularly troublesome because the legal uncertainty it deemed dispositive—the question of the validity of foreign trusts [16]—was a wholly collateral issue of law. Any confusion there may have been concerning the law of foreign trusts was simply irrelevant here. It was

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trary to the *Critzer* court (498 F.2d at 1163 n.5), these views do not support the *James* plurality "on the point in issue"; nor do they support the holding in the instant case.

[16] "The government, however, has not pointed to any cases which invalidated the FTO's [Foreign Trust Organizations] presented in this particular case" (App., *infra*, 8a). "The use of foreign trusts to save taxes was still a highly debatable issue" (*ibid.*).

the nature of the transactions, rather than the nature of the entities, that made respondents' scheme fraudulent.

As the dissent pointed out (App., *infra*, 14a), this case is governed by "settled principles of tax law regarding sham 'gifts' and transactions." Those principles clearly established that the transactions respondents advocated were blatantly fraudulent. Under respondents' scheme, a user would claim as a deduction the amount of money paid to a trust as a purported business expenditure. But he would retain control of the money and, pursuant to a prestructured scheme, ultimately cause all or a portion of the money to return to himself as a so-called "gift" [17] or "loan."

This Court has held that in determining tax consequences, the economic realities of the transaction, rather than its form, are controlling. *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 573 (1978); *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945); *Higgins* v. *Smith*, 308 U.S. 473, 477 (1940); *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935). Further, in determining the substance of a transaction, it is necessary to view the transaction as a whole, taking into consideration each of its steps. *Court Holding Co.*, 324 U.S. at 334; *Minnesota Tea*

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[17] In his dissent,, Judge Goodwin correctly concluded (App., *infra*, 14a): "There were no 'gifts' here within the clear intent of the statute because the taxpayers controlled the transactions of their trusts. See *Hilda M. Royce*, 18 T.C. 761 (1952); see also *Jackson*, 32 BTA 470 (1935); *Stine*, 32 BTA 482 (1935)." Moreover, as part of a prestructured transaction the "gift" was plainly in consideration of the expenditure, and therefore was not a gift within the contemplation of the tax laws. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 285 (1960).

Co. v. *Helvering*, 302 U.S. 609, 613 (1938). Here the "gift" or "loan" was but a part of a single integrated transaction, and must be viewed as a reimbursement of the earlier payment. Thus, the full amount of the expenditure could not be claimed as a deduction; it had to be reduced by the amount of the "gift" or "loan." See *Manocchio* v. *Commissioner*, 710 F.2d 1400, 1402 (9th Cir. 1983); *United States* v. *Daniels*, 617 F.2d 146, 147-148 (5th Cir. 1980); *Glendinning, McLeish & Co.* v. *Commissioner*, 61 F.2d 950 (2d Cir. 1932); see also *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1067-1068 (6th Cir.), cert. denied, 439 U.S. 953 (1978).

Even if all uncertainties in the use of foreign trusts were resolved in favor of the taxpayer, respondents' scheme would still be illegal. Regardless of the entities or persons involved (see *Griffiths* v. *Commissioner*, 308 U.S. 355, 357-358 (1939)), the transactions used to create deductions in this case were shams and could not be recognized for tax purposes.

Respondents' scheme is similar in this respect to that found to support criminal liability in *United States* v. *Baskes*, 687 F.2d 165 (7th Cir. 1981). There, the defendant assisted in the establishment of foreign trusts for the purpose of disguising a fraudulent form of commodity tax straddle. The taxpayers then engaged in risk-free commodity transactions in which losses generated in the United States (and deducted from income taxes) were offset by gains to the foreign trusts. Based on evidence of criminal intent,[18] the court upheld Baskes' conviction under Section

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[18] The defendant in *Baskes*, like respondents here, argued that his conduct was not willful because he could reasonably have believed the domestic commodity trade losses were deductible.

7206(2). There, as here, the validity *vel non* of the foreign trusts was irrelevant to the prosecution; there, as here, the foreign trusts were mere vehicles for sham transactions.

Respondents attempted to conceal the fictitious nature of the deductions created through use of the ALA program by covering them with a facade of apparent legality. By focusing on the validity of the trusts, rather than on the nature of the transactions accomplished through use of the trusts, the court of appeals was misled by the deception and was distracted from the substance of the transaction. This makes the court's holding all the more troublesome, for it extends the immunity from prosecution for violations of "uncertain" tax laws to tax evasion schemes involving any "uncertain" element—even where that uncertainty could not possibly give rise to any doubt about the fraudulent character of the overall scheme.[19]

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[19] On the basis of its holding on the substantive counts, the court of appeals also held that there was insufficient evidence of criminal intent to sustain the conspiracy convictions (App., *infra*, 12a-13a). It reasoned that the substantive offenses underlying the conspiracy count were violations of Section 7206(2); if there was insufficient evidence to support a finding of willful violations of Section 7206(2), the court reasoned, there could be no conviction on the conspiracy count either. However, the indictment here alleged a conspiracy to defraud the United States, not to commit a particular offense. Consequently, the necessary intent is to interfere with or impair a governmental function by deceit, craft, or trickery. *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). Here, as discussed above, there was ample evidence that the respondents intended to impair the government's tax collection efforts by deceit, craft, or trickery. Thus, the evidence was sufficient to sustain the conspiracy convictions even if, as the court held, respondents could not be convicted on the substantive counts. *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), cert.

2. The court of appeals also held that promotion of a fraudulent tax avoidance scheme of this sort is protected by the First Amendment.[20] This holding conflicts with decisions of this and other courts, embodies a fundamental misconception about the scope of First Amendment protections, and is gravely injurious to the government's efforts to prevent and deter fraudulent and abusive "tax shelter" promotions.

a. Relying on *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the court of appeals stated (App., *infra*, 10a (deletions in original)):

> Nothing should be clearer at this stage in the development of first amendment jurisprudence than "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy . . . of law violation except where such advocay is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The court of appeals did not explain its understanding of the term "imminent," nor did it cite any other decisions bearing on the application of the First Amendment to speech employed to instigate unlawful conduct. The court simply concluded, without analysis, that "[n]othing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action" (App., *infra*, 10a (emphasis

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denied, 355 U.S. 924 (1958). In any event, if this Court agrees with our position regarding the substantive counts, the reversal of respondents' convictions on the conspiracy count will not stand.

[20] For purposes of this alternative holding, the court expressly assumed—contrary to its holding—that respondents "knew that a taxpayer who actually performed the actions they advocated would be acting illegally" (App., *infra*, 10a).

in original)). The court thus held that "the first amendment would require a further inquiry before a criminal penalty could be enforced" (*ibid.*).[21]

In the specific context of tax evasion, the decision is in conflict with decisions of the Eighth Circuit in *United States* v. *Moss*, 604 F.2d 569 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980), and *United States* v. *Buttorff*, 572 F.2d 619 (8th Cir.), cert. denied, 437 U.S. 906 (1978). In *Buttorff* and *Moss*, the defendants were convicted of aiding and abetting the filing of fraudulent income tax withholding forms, in violation of 26 U.S.C. (Supp. V) 7205 and 18 U.S.C. 2. They had made speeches in which they advised taxpayers how to file false withholding forms, and taxpayers had followed their advice. The convictions were upheld against First Amendment challenge, without any requirement that unlawful action be immediate.

The decision below is also difficult to reconcile with *United States* v. *Damon*, 676 F.2d 1060, 1062 (5th Cir. 1982), in which the Fifth Circuit rejected a defense assertion that 26 U.S.C. 7206(2) violated the First Amendment. The court held that the conduct proscribed by Section 7206(2) "can not be considered 'pure speech'" (676 F.2d at 1062). Analyzing the statute in light of *Brandenburg*, the court determined (*ibid.* (citations omitted)):

> The statute here involved proscribes only purposefully incited imminent lawless activity. This is clearly discerned from the commonly under-

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[21] The court did not explain what "further inquiry" might be in order. In light of the court's conclusion that "concern with protecting the public fisc" cannot "justify" criminal prosecution for speech of this kind (App., *infra*, 10a), we can envision no further proceedings that could cure the alleged constitutional defect in this prosecution.

stood meanings of "procure," "counsel" and "advise," and from judicial interpretations of the statute itself. The type of incitive speech with which we are here concerned is surely not constitutionally protected speech.

Moreover, the court of appeals has misconstrued this Court's decisions. Speech that incites unlawful conduct is not protected merely because the conduct is not completed immediately. The fundamental principle, derived from the common law, is "that a person who procures another to do an act is responsible for that act as though he had done it himself." *Dennis* v. *United States*, 341 U.S. 494, 545 (1951) (Frankfurter, J., concurring); see *Yates* v. *United States*, 354 U.S. 298, 320 (1957); *Fox* v. *Washington*, 236 U.S. 273, 277-278 (1915).[22] The issue is causation, not timing. Where protected speech—especially political rhetoric—is involved, however, the courts have looked to proximity in time as an objective indicator of causation. A speaker thus cannot be held responsible for the remote consequences of his speech. See *Brandenburg*, 395 U.S. at 447.

The *Brandenburg* rule has recently been restated by this Court in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982): "a finding that [a person's] public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period." At issue in *Claiborne Hardware* were the

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[22] Significantly, federal statutes directed at promoters of abusive tax shelters are predicated on the congressional judgment that the "professional advisor or salesman of a tax shelter is generally *more culpable* than the purchaser who may have relied on their representat[ions] as to the tax consequences of the investment." 1 S. Rep. 97-494, 97th Cong., 2d Sess. 266 (1982) (emphasis added).

speeches of NAACP State Secretary Charles Evers, described by the Court as "spontaneous and emotional appeals for unity and action in a common cause" (*id.* at 928). The lower courts had held Evers liable for damages to property caused some time after the speech. A "reasonable period" for determining whether Evers could be held responsible for the subsequent acts of violence, according to this Court, was no more than "weeks or months" (*ibid.*). Here, there was pecuniarily motivated counseling of fraudulent tax transactions that led to prompt preliminary steps by program participants to implement respondents' program. See, *e.g.*, Tr. 1036-1037, 1047-1056, 1094-1113, 1840-1850, 1858-1869.

While the actual filing of false tax returns occurred somewhat later, it is absurd to suggest in the tax evasion context that the fraudulent return must be filed immediately on the heels of the tax promoter's counsel and assistance. Unlike the flash of violence that may follow an inflammatory speech, a tax evasion scheme requires time. In this case, the trust organizations recommended by respondents had to be set up (a process inevitably more time-consuming because done abroad), the paper transactions had to be carried out, and the tax returns had to be prepared. Moreover, the transactions had to take place during the year for which taxes were to be evaded, whereas participants would not complete their unlawful activity until the time to file tax returns—usually April 15 of the following year. To find such conduct insufficiently "imminent" as a matter of constitutional law is to insulate virtually all tax evasion promotion schemes from punishment.[23]

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[23] The court of appeals' holding could lead to the wholly irrational result that those who counsel and advise the filing of false tax returns early in the tax year are constitutionally

b. The court of appeals compounded its error by treating this as a case of pure speech within the core protections of the First Amendment, like that in *Brandenburg* and *Claiborne Hardware*, when in fact it involved extensive conduct other than speech, directly leading to actual violations of law. Moreover, the court disregarded the fact that the speech itself was less-protected, commercial speech.

Respondents were not prosecuted for mere advocacy of violation of the tax laws. Their conduct went far beyond mere speech. In addition to respondent Durst's assistance in the preparation of a false individual tax return, recognized by the court of appeals (App., *infra*, 10a), respondents provided materials to assist in carrying out the "tax shelter" program, set up foreign trust organizations for some participants, provided false social security numbers and suggested fictitious names for use on authorized bank account records, and accompanied some participants to assist them in opening accounts under phony names. They also distributed and required program participants to sign affidavits pledging to withhold cooperation from law enforcement authorities. See pages 3-8, *supra*. The court of appeals' conclusion that their activities fell within First Amendment protections is thus contrary to this Court's holding that "the constitutional freedom for speech and press * * * [does not extend] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

The court of appeals also disregarded the commercial character of respondents' speech. Respondents'

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protected, but that those who give their advice and counsel on April 14 (when it is ordinarily too late to put it to use in the returns about to be filed) are not.

speech was simply a service, sold to the participants for a price. Cf. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456-457, 459 (1978). But this Court has unequivocally held that "[t]he government may ban * * * commercial speech related to illegal activity." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-564 (1980), citing *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 388 (1973). See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); see also *Lamar Outdoor Advertising* v. *Mississippi State Tax Commission*, 701 F.2d 314, 323 (5th Cir. 1983); *Casbah, Inc.* v. *Thone*, 651 F.2d 551, 564 (8th Cir. 1981), cert. denied, 455 U.S. 1005 (1982). Thus, under the decisions of this Court respondents can legitimately claim no constitutional right to sell "how-to" materials on breaking the law.

3. The decision in this case, if not reversed, will seriously interfere with the collection of the revenue. Our tax system depends to a large degree on voluntary compliance. Fraudulent tax evasion schemes are doubly pernicious: not only do they lead participants to file false and fraudulent returns; they also undermine the vital national sense that conscientious tax reporting is a shared obligation of all. See 1 S. Rep. 97-494, 97th Cong., 2d Sess. 266 (1982) Moreover, as a question of law enforcement strategy, "[a]busive tax shelters must be attacked at their source: the organizer and salesman" (*ibid.*). Combatting organized tax evasion promotion schemes, such as respondents', is therefore one of the highest priorities of the IRS (General Accounting Office, *With Better Management Information, IRS Could Further Improve Its Efforts Against Abusive Tax Shelters* 1, 6-7, 30-33 (1983)). The IRS reports that some 340,000 returns are currently under audit be-

cause of potential tax shelter questions, and that 18,570 out of some 58,000 cases docketed in the Tax Court as of November 30, 1983, involved tax shelter issues. The abusive tax shelter problem is also a source of grave concern in Congress.[24]

The decision below borders on the irresponsible. Both of the alternative holdings serve to frustrate the fair and effective enforcement of tax obligations. The holding regarding willfulness will encourage the proliferation of abusive tax shelters, as promoters discover that they can avoid criminal responsibility *even for knowingly fraudulent schemes*, if they can but devise a variation not anticipated by statute, regulation, or case law. Especially given the way the court of appeals evaluated the scheme in this case, it will be a rare case where prior precedent is so clear that a nonfrivolous claim of uncertainty cannot be made. The First Amendment holding will give promoters the confidence that—at least if their schemes are not carried out *immediately*—they will be cloaked with the protections of the First Amendment.

As applied in the Ninth Circuit alone, the decision is troubling, for it affects a large population and creates an inconsistency in national standards of tax law enforcement.[25] And even if the holding below is

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[24] In 1982, Congress enacted several measures specifically directed against abusive tax shelters, including a penalty for promoting abusive tax shelters (codified at 26 U.S.C. 6700); a procedure for enjoining promoters of abusive tax shelters (codified at 26 U.S.C. 7408); and new penalties for substantial understatements (codified at 26 U.S.C. 6661). See Pub. L. No. 97-248, §§ 320(a), 321(a), and 323(a), 96 Stat. 611, 612, and 613.

[25] Even before *Dahlstrom* was decided, the United States District Court for the Eastern District of Wisconsin granted

rejected by other courts, it will lend credence to the claims and pretensions of abusive tax shelter promoters, whose best tactic is to play on the limited legal understanding of the public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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protest leader Alton R. Moss, a/k/a John L. Freeman, an acquittal on the ground that his advising taxpayers to violate the tax laws was protected by the First Amendment, even though the taxpayer committed violations on his advice. (No. 81-CR-112; see R. 336). *Dahlstrom* could lead to more district court actions of that sort.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-1137, 82-1141, 82-1138, 82-1142 and 82-1143

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

KARL L. DAHLSTROM, R. BRUCE RIPLEY, HIRAM E. CONLEY, DAVID J. MORRIS, and GAZE DURST,
DEFENDANTS-APPELLANTS

Argued and Submitted March 10, 1983

Decided Aug. 24, 1983

Appeal from the United States District Court
for the Western District of Washington

Before GOODWIN, ALARCON, and FERGUSON, Circuit Judges.

Appellants Dahlstrom, Ripley, Conley, Morris and Durst were convicted by a jury of conspiracy to defraud the United States. 18 U.S.C. § 371, and of aiding and abetting the preparation and presentation of fraudulent income tax returns. 26 U.S.C. § 7206(2). Each appellant contends the evidence was insufficient

to sustain a conviction as to the crimes charged against him. We agree.

I. STANDARD OF REVIEW

In determining whether a jury verdict rests on sufficient evidence, a reviewing court must view the evidence in the light most favorable to the prosecution and determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Universal Trade and Industries*, 695 F.2d 1151, 1153 (9th Cir. 1983).

II. PROCEDURAL BACKGROUND

Appellants were charged in a seven-count criminal indictment brought by the United States. Count I charged all five appellants with conspiracy to defraud the government in violation of 18 U.S.C. § 371. Counts II through VII charged one or more of the appellants with violations of section 7206(2) of the Internal Revenue Code.

Dahlstrom and Ripley were indicted under all of the counts. Dahlstrom was convicted under every count save count IV, and Ripley was convicted under counts I, III and V. Conley was charged and convicted under counts I, II, VI, and VII. Morris was charged and convicted under counts I and V, while Durst was both charged and convicted under counts I and VII.

The district court sentenced each appellant to imprisonment on count I: Dahlstrom for five years, Ripley for four years, Conley for three years, Morris for 18 months and Durst for one year. The court also

sentenced each appellant to five years probation on each of the remaining counts on which he was convicted.

III. FACTS

In 1976, Dahlstrom began to promote and sell a tax shelter program he had devised. At various times thereafter, Ripley, Conley, Morris and Durst joined in the promotion and sale of the program.

Sales of the program took the form of sales of membership in an organization that Dahlstrom had formed called, the American Law Association (ALA). Purchasers of the program bought membership in the ALA. As members, they were entitled to receive instruction and materials relating to the tax shelter program at ALA two-day seminars. Members attending these ALA seminars were charged fees ranging from $6,000 to $12,000.

At these seminars, Dahlstrom and Ripley instructed members on how to create foreign trust organizations (FTO's) in order to reduce their tax liabilities. The members were also provided with forms for setting up such trust organizations and documenting trust transactions. In addition, members received instruction on a "taxpayer defense program" which consisted of lawful actions a member could utilize in the event of an IRS audit. While the program did not include advice or assistance in preparing a member's income tax return, some of the appellants occasionally assisted a member in establishing his FTO by traveling to the designated country and executing the requisite trust documents on behalf of that member.

Members who implemented the ALA tax shelter program caused three trust organizations to be created in a foreign country by a citizen of that country.

Typically, trust number one would be named trustee of trusts two and three, although the person implementing the FTO's retained complete control over all three trusts.

This tax shelter program contemplated that trust number two would be treated as a non-resident alien (purely for tax purposes) and would be subject to tax on payments from the user of the program. In order to reduce trust two's tax liability, purchasers of the program had trust two make payments to trust three. Payments made to trust three would not represent taxable income since trust three would be a foreign entity receiving income from a foreign source.

The final stage of this tax shelter program involved the return to the purchaser of some or all the money he paid to trust number two. In order to achieve this goal, a purchaser would have trust two borrow money from trust three and execute a demand note payable to trust three. Trust three would then transfer the demand note to the purchaser as a gift and the purchaser would demand and receive payment from trust two. This method was premised on 26 U.S.C. § 102 (IRC), which excludes gifts from gross income for income tax purposes, and IRC section 2501 which provides a gift tax exemption for gifts of intangible property by a non-resident alien to a citizen of the United States.

The thrust of the government's case depended in large part on evidence of the trusts and subsequent tax return of Dr. John Ricketts. In November of 1977, Dr. Ricketts expressed interest in the ALA program and attended introductory meetings. Dr. Ricketts' accountant ultimately advised against use of the ALA tax shelter program.

After discussions with his accountant, however, Dr. Ricketts asked O'Leary, a former IRS investigator, to review a tape he had made of a December meeting of the ALA. Shortly after submitting the tape to O'Leary, Dr. Ricketts was contacted by Randy Draughon, an agent for the IRS Criminal Fraud Investigation Division. Agent Draughon returned Dr. Ricketts' tape and asked him to assist in an investigation of the ALA.

In November of 1978, Dr. Ricketts attended an ALA two-day seminar. He was accompanied by IRS agent Walter Perry, who posed as Vince Paoli, a financial advisor to Dr. Ricketts. In order to assist the IRS investigation, Dr. Rickets authorized appellant Conley to implement the ALA tax shelter program in Belize.

After Dr. Ricketts' trusts were set up, Dahlstrom and Conley advised Agent Perry and Ricketts on creating a deduction by repurchasing his tax package from one of his trusts. Conley also recommended that Ricketts obtain accounting services from Durst. Though it was not his general practice to prepare tax returns for ALA members, Durst agreed to do so for Dr. Ricketts.

Durst advised Agent Perry that Dr. Ricketts could deduct $50,000 for 1978, for the repurchase of his tax package from his trust number two if the check had been written before the end of December, 1978. On March 30, 1979, Agent Perry received the tax return that Durst had prepared for Dr. Ricketts. On the return, Durst had taken a deduction for Dr. Ricketts' repurchase of the tax shelter package. Agent Perry fowarded the return to IRS Special Agent Don Jensen. Dr. Ricketts was not concerned with the validity of this return since he had been advised by

Agent Jensen that the Durst return would not represent his true return with the IRS.

This investigation resulted in the return of a seven-count criminal indictment based upon Dr. Ricketts' transaction and a number of similar transactions involving other appellants.

IV. SUFFICIENCY OF THE EVIDENCE

A. *Counts II-VI*

Counts II through VI charged the defendants with various violations of section 7206(2) of the Internal Revenue Code. This section imposes criminal sanctions against anyone who "willfully aids or assists in, procures, counsels, or advises the preparation or presentation under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter. . . ." 26 U.S.C. § 7206(2). Appellants contend that the government's proof was insufficient to establish that they willingly and knowingly aided in the presentation and preparation of false income tax returns.

In order to convict a person under section 7206(2), the government must prove the following elements of the offense beyond a reasonable doubt:

1. That defendants aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return;
2. That the return was fraudulent or false as to a material matter; and
3. That the act of the defendant was willful. *United States v. Perez*, 565 F.2d 1227, 1233-34 (2nd Cir. 1977); *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976).

The Supreme Court has defined the term "willfully" under section 7206 to mean a "voluntary intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976); *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982). We have determined that the term "willful" under the statute "requires proof of a specific intent to do something which the law forbids; more than a showing of careless disregard for the truth is required." *United States v. Brooksby*, 668 F.2d 1102, 1104 (9th Cir. 1982).

The dispositive issue in this case is whether the evidence shows that appellants acted with the specific intent to violate section 7206(2). We have concluded, when viewed in the light most favorable to the government, that the evidence was insufficient to support a finding that appellants possessed a specific intent to violate section 7206(2).

In order to meet its burden of proof as to the appellants' willfulness, the government relies upon three major contentions. First, the government asserts that the FTO's advocated by the ALA had no economic substance and were therefore blatant shams. Second, the government argues that the "taxpayer defense program" could reasonably be found to be inconsistent with a belief in the legality of the tax shelter program. Finally, the government points to some statements made by appellant Durst to show that the appellants had guilty knowledge.

In support of its first contention, the government argues that the law is clear that economic realities of a transaction rather than form are controlling for tax purposes. Consequently, the government asserts that the appellants were well aware of the inherent illegality of the tax deductions which flowed from use

of the ALA tax shelter program. The government, however, has not pointed to any cases which invalidated the FTO's presented in this particular case. Moreover, the government's own expert witness, Karl K. Krogue, testified that the trusts created through implementation of the ALA tax shelter program were valid legal entities.

The government's reliance on *Zmuda v. Commissioner*, 79 T.C. No. 714 (1982), is misplaced. *Zmuda* did not address the issues of good faith, intent, or belief in the legality of the deductions. The sole issue before the tax court was whether Zmuda's FTO's had a business purpose, and if the claimed deductions were valid. We further note that *Zmuda* was a civil proceeding. It was not decided until some ten months after these appellants had been convicted. Due process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requirements of the law. *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2203, 60 L.Ed.2d 755 (1979). Reliance on *Zmuda* as establishing an ex post facto determination that the ALA tax shelters were illegal would not afford the appellants that fair notice.

The government's assertion that the law was clear as to the application of substance over form in criminal prosecutions under section 7206(2) is further contradicted by the evidence at the time of trial. The use of foreign trusts to save taxes was still a highly debatable issue. Darrell D. Hallett, Regional Counsel for the IRS in Seattle, called as a witness for the prosecution, testified that his office had been approached by a number of practioners who were confused as to the laws dealing with foreign trusts. This confusion prompted the Deputy Director of the

IRS to issue a position paper regarding the use of foreign trusts. We note that this position paper was not issued until August 8, 1979. The indictment in this matter was premised upon actions which occurred before the issuance of the paper.

Even if we were to assume that appellants were negligent in continuing to promote the ALA tax shelter program in light of the IRS's adverse position paper, the law is clear that "degrees of negligence only give rise in the tax system to civil penalties." *United States v. Bishop*, 412 U.S. 346, 360, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1972). The criminal law concerns itself with willful violations of tax law, *United States v. Brooksby*, 668 F.2d at 1102; and "its purpose is not to penalize frank differences of opinion." *United States v. Bishop*, 412 U.S. at 361, 93 S.Ct. at 2017.

We are convinced that the legality of the tax shelter program advocated by the appellants in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law . . . is highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal proceeding pursuant to section 7206 "is an inappropriate vehicle for pioneering interpretations of tax law." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979).

As noted above, the government asks us to find that the ALA's use of a taxpayer defense program is sufficient proof of a specific intent to violate section 7206 (2). Even the government concedes, however, that the actions recommended in the taxpayer defense program were not unlawful (Gr. Br. p. 27). We are unpersuaded that the appellant's advocacy of various

lawful actions translates into proof that the appellants were aware of the illegality of their tax shelter program.

Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in the preparation of any individual tax form. Rather, they merely instructed an audience on how to set up a particular tax shelter. Nothing should be clearer at this stage in the development of first amendment jurisprudence than "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy . . . of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Bradenberg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (per curiam).

Nothing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action. Not even national security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more.

Finally, the government cites several statements made by Durst as sufficient to show the appellants' requisite intent. Although these statements may have been admissible against *Durst* as admissions upon proof of a corpus delecti of some crime, they were clearly inadmissible as proof of the crimes charged against the other appellants.

In order for the statement of a coconspirator to be admissible against his fellow conspirators under Rule 801(d)(2)(E), Fed. R. Evid., the government must establish substantial independent proof of the existence of the conspiracy. *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981); *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979). As we explain below, there is no independent proof of a conspiracy. Therefore, these statements could not be used against Durst's codefendants for any purpose.

We conclude that proof of the requisite intent to violate section 7206(2) is not shown in this record.

B. *Count VII*

Count VII related to the tax return prepared by Durst for Dr. John Ricketts. This return was never filed with the IRS. It was never intended to represent Dr. Ricketts' true return with the IRS. (RT: 2395-96). The government contends that an offense under section 7206(2) may be committed without the filing of a document. We disagree.

In *United States v. Habig*, 390 U.S. 222, 88 S.Ct. 926, 19 L.Ed.2d 1055 (1968), the Supreme Court specifically stated that the crime of fraudulent preparation of a tax return is "committed at the time the return is filed." *Id.* at 223, 88 S.Ct. at 927. Other courts have arrived at similar conclusions.

In *Butzman v. United States*, 205 F.2d 343 (6th Cir. 1953), the defendant argued that the statute of limitations started to run on the day the fraudulent return was prepared, not the later date upon which it was filed. In rejecting the argument, the court stated "[n]o crime was committed by Butzman until the application was filed. No crime would have been

committed if the application had not been filed." *Id.* at 351. *See also United States v. McGee*, 572 F.2d 1097 (5th Cir. 1978) (offense of filing a fraudulent return is complete at the time of filing).

We find that the filing of a return is in fact an element of a section 7206(2) violation. Since the return prepared by Durst was never filed, each appellant's conviction under count VII must be set aside.

C. *Conspiracy*

Appellants were convicted of conspiracy to defraud the United States by impeding, impairing and obstructing the IRS in the ascertainment, computation, assessment and collection of income taxes. 18 U.S.C. § 371. The appellants contend that they lacked the necessary intent to commit the substantive offense. We agree.

We have determined that the government must prove the following elements in order to sustain a conviction for conspiracy:

1. Agreement to accomplish an illegal objective;
2. Coupled with one or more overt acts in furtherance of the illegal purpose; and
3. The requisite intent to commit the substantive offense.

United States v. Melchor-Lopez, 627 F.2d 886 (9th Cir. 1980).

"It is hornbook law that when knowledge of a fact is required to convict for a substantive offense, knowledge is also required to convict for conspiracy to commit the substantive offense. *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 (1969); *United States v. Eaglin*, 571 F.2d 1069, 1074 (9th Cir. 1977); *United States v.*

Bekowies, 432 F.2d 8, 14 (9th Cir. 1970). "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. at 678, 79 S.Ct. at 1319.

What we have said concerning the insufficiency of the evidence as to counts II through VI is also dispositive of the conspiracy count. The government's failure to present evidence as to the appellants specific intent to violate the underlying substantive count requires us to set aside the convictions premised upon 18 U.S.C. § 371.

V. CONCLUSION

The government has failed to establish that the appellants advocated a tax shelter program with the specific intent to violate section 7206(2).

These appellants were prosecuted in spite of the fact that no statute, regulation or court decision gave fair warning that advocacy of the creation of lawful foreign trust corporations as a tax shelter would result in a criminal prosecution if the challenged transaction might later be held to lack economic substance for purposes of a civil tax proceeding.

Prosecution for advocacy of a tax shelter program in the absence of any evidence of a specific intent to violate the law is offensive to the first and fifth amendments of the United States Constitution.

The judgments are REVERSED.

GOODWIN, Circuit Judge, dissenting:

The majority's opinion finds that what defendants assisted, counselled, and advised their client to do was not clearly illegal at the time they gave the advice and assistance. The majority therefore finds a failure of "proof of a specific intent to do something which the law forbids," *U.S. v. Brooksby*, 668 F.2d 1102, 1104 (9th Cir. 1982). The opinion notes that *Zmuda v. Commissioner*, 79 T.C. No. 714 (1982) was not decided until ten months after these convictions.

The government specifically did not rely on *Zmuda*. It had no need to so rely. It relied on settled principles of tax law regarding sham "gifts" and transactions. Defendants advised their clients to use sham transactions to evade taxes. Such schemes have been illegal since *Gregory v. Helvering*, 293 U.S. 465, 469-70, 55 S.Ct. 266, 267-68, 79 L.Ed.2d 596 (1935) and *Knetsch v. United States*, 364 U.S. 361, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960). See also *Barnett v. C.I.R.*, 364 F.2d 742 (2nd Cir. 1966); *Lynch v. C.I.R.*, 273 F.2d 867 (2nd Cir. 1959). There were no "gifts" here within the clear intent of the statute because the taxpayers controlled the transactions of their trusts. See *Hilda M. Royce*, 18 T.C. 761 (1952); see also *Jackson*, 32 BTA 470 (1935); *Stine*, 32 BTA 482 (1935).

Defendants' knowledge that they were advising and assisting illegal tax evasion is obvious from the record. Defendant Morris provided client Howlett false employer identification numbers to be used in connection with the sham trust bank accounts. Defendant Durst recommended that client Ricketts set up additional sham trusts to make future transactions more difficult for the I.R.S. to trace. Defendants Ripley and Durst recommended that clients use blue "copy-not" pens to sign checks so that I.R.S. agents

could not read them on bank microfilm records. Defendant Morris instructed client Dr. Howard Bean to use specified fictitious names as the authorized signatures on bank accounts opened for the trusts and Morris accompanied Bean when Bean opened accounts using the fictitious names supplied by Morris. Bean also followed Morris's advice and used a false name on a non-resident alien tax return he filed for one of his sham trusts. Defendant Durst counselled clients to alter their Social Security numbers on trust bank accounts to prevent the I.R.S. from tracing them.

Defendants clear knowledge of the illegality of their scheme was evident in the affidavit they required all participants to sign stating that they would not aid any governmental unit or agency in any civil, *criminal*, or administrative action against the defendants, and that the member would not divulge to any governmental agency any information concerning his relationship with the defendants. Defendant Durst explained to "client" Paoli (I.R.S. Special Agent Perry) why all the strategies for concealment were necessary. "If they (the I.R.S.) get ahold of your books or records, they could probably shoot holes in this thing. . . . Yeah if they do you're in trouble . . . . Then you're talking about tax avoidance, tax fraud, and the whole thing." There could hardly be any clearer evidence that the defendants in this case knew that what they were advising and assisting clients to do was patently illegal.

Defendants did more than advise taxpayers. They committed acts in furtherance of the conspiracy. Defendants Conley and Morris traveled to Belize and the Turks and Caicos Islands to set up sham trust organizations for the taxpayers. Defendants Conley, Ripley and Morris also actively assisted taxpayers in opening

bank accounts for the sham trusts. And defendant Durst prepared a fraudulent tax return.

Attendance at ALA meetings and distribution of ALA membership fees established membership in the conspiracy for all defendants except Durst. Defendant Durst attended ALA meetings but did not receive distributions of membership fees. But he did counsel his clients to participate in the scheme and agreed with his co-conspirators that he would prepare tax returns claiming deductions based on the ALA program. Durst thus participated in the conspiracy and by counselling his clients to file fraudulent tax returns he committed a substantive offense in furtherance of the conspiracy.

Durst did more. He actually prepared a fraudulant tax return that he believed his client, Dr. Ricketts, would file and he thus violated 26 U.S.C. § 7206(2). Ricketts did "file" the return, but both Ricketts and the I.R.S. knew that it would not be his true return, because Ricketts was cooperating with the I.R.S. investigation of the scheme.

26 U.S.C. § 7206(2) states:

> "Any person who—. . . (2) . . . Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

I cannot agree with the legal conclusion in the majority's opinion that Durst could not have violated 26 U.S.C. § 7206(2) because the return was never "presented" as a true return to the I.R.S.

Title 26 U.S.C. § 7206(2) makes aiding or advising "the *preparation or* presentation" of a fraudulent income tax return a crime. There are no cases in this circuit holding that presentation is a necessary element to the separate crime of fraudulent preparation. To create such a requirement would render the words "preparation or" mere surplusage. For returns that are actually presented, the term "presentation" would be enough to permit punishment of the advisor. The statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented. A statute should be construed so that no word, sentence, or clause shall be superfluous. *Ex Parte Public Bank*, 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928); *Consolidated Flower Ship. v. Civil Aeronautics Bd.*, 205 F.2d 449, 450 (9th Cir. 1953).

The cases cited in the majority's opinion are not in point because all were cases in which the fraudulent return was *both* prepared *and* presented and the question was from what date the statute of limitations should run. *United States v. Habig*, 390 U.S. 222, 88 S.Ct. 926, 19 L.Ed.2d 1055 (1968) held that the government could press charges within six years from the actual filing of the returns, not from the statutory due date. Presentation is a separate act from preparation and the government could prosecute up to six years from that act. There was no holding in *Habig* that the government could not prosecute for fraudulent preparation alone.

Similarly in *Butzman v. United States*, 205 F.2d 343 (6th Cir. 1953), *cert. denied*, 346 U.S. 828, 74 S.Ct. 50, 98 L.Ed. 353 (1953), the Sixth Circuit ruled that the statute of limitations ran from the date of filing, not from the date of preparation. The dicta in *Butzman* that no crime was committed until the application was filed and that no crime would have been committed if the application had not been filed have never been adopted by the Ninth Circuit. The dicta would render the words "preparation or" in § 7206(2) nugatory, and we should not adopt them.

The crime of fraudulent preparation should be deemed complete when the preparer delivers the returns to a client with the belief that the client will file them.

Durst advised Ricketts to back date a check so that he could claim a deduction. And the tax return he prepared for Ricketts included a deduction for "repurchase" of ALA tax shelter documents that Durst knew was a sham. He knew the return he prepared contained false deductions and he therefore violated § 7206(2).

There was no violation of first amendment protected speech or association here. The first amendment does not protect communications that are part of conspiracies to commit unlawful acts. *U.S. v. Buttorff*, 572 F.2d 619 (8th Cir. 1978), *cert. denied*, 437 U.S. 906, 98 S.Ct. 3095, 57 L.Ed.2d 1136 (1978).

Viewing the evidence in the light most favorable to the jury's verdict and drawing all reasonable inferences, there was substantial evidence from which the jury reasonably could have found the defendants guilty beyond a reasonable doubt. *U.S. v. Friedman*, 593 F.2d 109, 115 (9th Cir. 1979); *U.S. v. Jacob-Gil*, 474 F.2d 1213, 1214 (9th Cir. 1973).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

C.A. Nos. 82-1137, 82-1138, 82-1141,
82-1142 and 82-1143

D.C. No. CR 81-116 RJR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

KARL L. DAHLSTROM, HIRAM E. CONLEY,
BRUCE R. RIPLEY, DAVID J. MORRIS,
and GAZE DURST, DEFENDANTS-APPELLANTS

[Filed Nov. 8, 1983]

ORDER

Before: GOODWIN, ALARCON and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.(35(b) [*sic*].

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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ALEXANDER L. STEVAS,
CLERK

NO. 83-1297

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

VS.

KARL L. DAHLSTROM, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT DAHLSTROM'S BRIEF IN OPPOSITION

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RESPONDENT DAHLSTROM'S BRIEF IN OPPOSITION

One of the respondents, Karl L. Dahlstrom (hereinafter referred to as Dahlstrom) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Ninth Circuit in the case. That opinion is reported at 713 F.2d 1423. *See also* Government Petition at 1a *et seq.* (hereinafter referred to as Pet. at _____).

STATEMENT

1. OVERVIEW OF THE ALA

The American Law Association (ALA) is a membership organization comprised of several hundred members from approximately thirty-five states. TR. 2962-64. The ALA was originally formed by Dahlstrom to avoid state laws prohibiting the practice of law without a license. TR. 3021. As of the date of trial, the ALA was situated in a 7200 square foot complex in Bryan, Texas. TR. 3285-86. Included therein was a courtroom, a tax law library with over 5000 volumes, and computer research facilities. TR. 3297-98. Among the services offered to ALA members, their attorneys and accountants, were two types of seminars. The first type of seminar was a two day seminar at which four separate subjects were covered: Part I - revocable living trust agreements; Part II - pure trust organizations; Part III - foreign trust organizations; and Part IV - taxpayer's legal defense. TR. 2994, 3025. *See* Govt. Ex. 230. The second type of seminar was an "Attorney/CPA" seminar which involved, typically, questions, answers and the interchange of ideas regarding the four part, two day seminars. TR. 3283-85. This second type of seminar was attended primarily by attorneys and accountants representing ALA members. TR. 3283-85. ALA members also received materials printed

by the ALA such as Govt. Ex. 146 and 230, as well as association newsletters which were designed to keep ALA members current on Supreme Court opinions and congressional legislation. TR. 2983-84. Finally, at various times, the ALA had numerous independent chapters situated in different portions of the United States. TR. 2986-88.

2. SUMMARY OF THE HISTORICAL DEVELOPMENT OF THE ALA

Respondent Dahlstrom is a well educated man having obtained a B.A. and a Masters in Physics and Education. He is also working on a Ph.D. TR. 2856-57. At various times, he has served as an instructor at the university level. TR. 2857. He has, however, no formal training as an attorney and is not licensed thereas. TR. 2882. Prior to trial, he had never before come into contact with the criminal justice system. TR. 2858.

In 1968, Respondent Dahlstrom, while employed as an engineer with Texas Instruments, read Norman Dacey's book "How To Avoid Probate." TR. 2991. Dacey's book was an inspiration to Dahlstrom. TR. 2993. Dahlstrom began doing research on pure trust organizations. TR. 2996-3000. Dahlstrom's research into pure trust organizations generated some newspaper coverage, TR. 3000-03, and in 1973, Dahlstrom gave a seminar in Missouri on pure trust organizations. The seminar focused on how pure trust organizations could be utilized to avoid probate and estate taxes. TR. 3003.

As a result of that seminar, Dahlstrom was permanently enjoined by the State of Missouri on April 17, 1974, from misrepresentation in connection with the advertisement of services he offered in the establishment of pure trusts. TR. 2822-24; 3003-13. Govt. Ex. 62. In connection with the injunctive action, all of Dahlstrom's financial records and tax returns, including those of certain business trusts he had previously es-

tablished, were subpoenaed by the State of Missouri. TR. 3013-14.

Shortly thereafter, Dahlstrom formed the ALA. TR. 3021. The ALA was formed due to the problems Norman Dacey had encountered in New York [including *criminal* contempt, *cf. Dacey v New York County Lawyer's Association*, 423 F.2d 188 (2nd Cir. 1969)] and the problems Dahlstrom had encountered in Missouri. TR. 2990-3027.[1]

Originally, the ALA program was comprised of two portions: (1) revocable living trust agreements; and (2) pure trust organizations. TR. 3027. *See* Govt. Ex. 146, 230. Later, however, based on, *inter alia:* (1) Dahlstrom's personal encounters with the IRS; (2) Dahlstrom's independent research into the Privacy Act, 5 U.S.C. §552a, the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Fifth and Sixth Amendments to the Constitution of the United States; and (3) information Dahlstrom obtained via the FOIA, Dahlstrom formulated an additional portion of the two day ALA seminars: taxpayer's legal defense. TR. 3112, 3117, 3151, 3159, 3166. Similarly, based on Dahlstrom's research into pure trust organizations, he originated an additional portion of the two day ALA seminars: Foreign trust organizations (FTO's). TR. 3210-22.

Dahlstrom's advocacy was not limited to ALA members. For instance, in May 1976, he presented a speech to the Indiana Medical Association on "judgement proofing" of estates. TR. 2867. *See also* TR. 2859, 2870-76.

Eventually, the IRS learned of Dahlstrom's advocacy and of the ALA program in general. Apparently due to a belief that Dahlstrom was advocating the creation of

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[1]Dahlstrom wrote a similar type book, entitled "How To Avoid Probate, Gift, Inheritance and Estate Taxes", in early 1974. TR. 2858.

family trusts,[2] TR. 3037, the IRS attempted to obtain the names of ALA members. The IRS attempted to obtain the names of ALA members by issuing a tax deficiency against Dahlstrom in connection with his personal use of business trust organizations. TR. 3029-3111. In connection with that deficiency, three summon enforcement actions were conducted. TR. 3029-3111. In each proceeding, however, Federal District Judges entered appropriate orders which protected the names of ALA members [based on the First Amendment]. TR. 3037, 3044, 3108, 3110. Also, the deficiency assessed against Dahlstrom by the IRS in connection with his personal use of business trusts was eventually dropped by the IRS. TR. 3103-04, 3587-93.

In early 1978, the IRS became aware of the precise nature of the seminars Dahlstrom conducted. TR. 2254-59, 2390-91. An undercover investigation was instigated in late 1978. TR. 1343, 1388-89, 1391-95, 2267-68. However, it was not until August 1979 that the IRS drafted and distributed to the public and the bar a position paper regarding FTO's. TR. 2448-85. Dahlstrom did receive a copy of that position paper. Govt. Ex. 267. Dahlstrom voiced his disagreement with the IRS position paper. TR. 2469-74, 2482-84. The dispute, simply stated, centered upon the issue of whether the legal form or the economic substance controlled in determining the tax consequences of FTO's. The IRS position was that substance always prevailed, regardless of the legal form employed. Based on Supreme Court opinions and other materials, Dahlstrom asserted that

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[2]Dahlstrom learned of this from materials he obtained from the IRS pursuant to his utilization of the FOIA. TR. 3027-3110. Dahlstrom also learned from those materials that someone had labeled him a "tax protestor". TR. 3039-42. Due to Dahlstrom's belief that the label "tax protestor" was incorrect and that someone had supplied false information to the IRS, Dahlstrom filed a complaint with the F.B.I. TR. 3095-98.

legal form would control except where the IRS code, Congress or the Courts had declared otherwise. TR. 2452-85. Govt. Ex. 262, 267. *See also* Def. Ex. G-X.

Dahlstrom inserted the IRS position paper and his sixteen page response thereto into the ALA seminar materials, distributed copies of both items to ALA members, and continued his advocacy of the two day, four part ALA program. TR. 3216-32. Dahlstrom was subsequently indicted in June 1981 for events allegedly occurring between 1976 and January 1980. CR. 1.

3. ADDITIONAL MATTERS RELEVANT TO THE GOVERNMENT'S "STATEMENT"

a. Generally

At trial, the Government's proof focused upon part III (FTO's) and part IV (taxpayer's loyal defense) of the ALA program. The Government took the position at trial that but for Dahlstrom's advocacy of FTO's, none of those individuals or corporations would have created FTO's and claimed deductions incident to the creation and utilization of those FTO's.

With regard to the FTO's, the Government's position at trial was that substance always controls over form, that Dahlstrom was well aware of that absolute rule of law, that Dahlstom's position regarding FTO's depended on form controlling over substance, and thus Dahlstom knew that he was advocating a sham (since the Government asserted that substance *always* controlled over form).

However, due to the dispute between Dahlstrom and the IRS in August 1979, the Government knew that Dahlstrom could and would dispute its position on substance versus form, that he would be able to introduce evidence (case law) to support his position, and that the ALA materials contained case law on both sides of the controversy. *See* e.g., Govt. Ex. 230, 262, 267.

Thus, it was necessary for the Government to take the position (which it did at trial) that Dahlstrom's advocacy of the propriety of reliance on the Privacy Act, the Freedom of Information Act and other statutory rights as well as the Fifth and Sixth Amendments revealed his specific intent to violate the tax laws.

b. Specific Responses To Government's Statement

1. The Government asserts that "respondents promoted and sold a 'tax shelter' program in which participants used a series of *sham* transactions . . ." Pet. at 3 (emphasis added). The Government's use of the term "sham" is a legal conclusion. It necessarily assumes a resolution of the underlying substance versus form controversy favorable to the Government; a resolution which was not decided at trial and which the Court of Appeals concluded was undecided with regard to FTO's at least until the IRS position paper was issued in August 1979.[3]

2. The Government asserts that "[t]he transactions, taken as a whole, had no economic substance; their sole purpose and effect was to generate phoney tax deductions for the participants." Pet. at 4. The Government's assertion ignores the trial testimony of the Government's expert witness, Karl Krogue. Although Krogue acknowledged that the FTO's created by Rickets were legal trusts, Krogue also testified that he *assumed* that Rickets' transactions had no business purpose and that given that *assumption*, the transactions had no substance for tax purposes. TR. 2513-14, 2574, 2596-

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[3]In actuality, the substance versus form argument in the context of FTO's has still not been decided. *Zmuda* v *Commissioner*, 79 T.C. No. 714 (1982), appeal pending, No. 83-7374 (9th Cir. filed May 23, 1983), addressed the issue of whether Zmuda's FTO's had a business purpose and whether the claimed deductions were valid. Thus, *Zmuda* supports the position that the tax treatment of FTO's must be determined on a case by case basis.

99.[4] Implicit in Krogue's testimony is the realization that the tax treatment of transactions involving FTO's was and is dependent upon: (1) resolution of the substance versus form controversy; and, (2) the business purpose(s) of the transaction.[5] TR. 2505-09. The testimony of the defensive expert, Michael Pinatelli, expressly supported that realization. TR. 3754-09, 3784-3870, 3889-3954.

As to the former issue, the record is replete with references to the controversy between Dahlstrom and the IRS. Similarly, the record is replete with references that Dahlstrom and the other respondents were constantly seeking additional legal opinions and reasons in support thereof as to the proper resolution of that controversy.[6] Finally, Dahlstrom even informed the ALA membership of the IRS position paper and of his re-

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[4]*Cf.* TR. 1922, 1940-41, where Mr. Howlett testified he established FTO's to place his assets outside the reach of creditors.

[5]Krogue also testified that in his opinion the FTO's would be treated as associations taxable as corporations under 26 U.S.C. §1491. TR. 2595. Thus, ALA members would be taxed on transfers into the FTO's as well as distributions out of the FTO's. Dahlstrom's materials included a discussion of 26 U.S.C. §1491. TR. 2945-46. Def. Ex. B-C. Krogue's testimony on this point was disputed by the defensive expert. TR. 3832-33.

[6]Dahlstrom's testimony at trial regarding his research into the substance versus form controversy tracked, to a certain extent, the materials (i.e., case law) he supplied ALA seminar attendees. *See* TR. 3117-33 and compare with Govt. Ex. 230. *See also* TR. 3256-81, where Dahlstrom elaborated on opinions from this Court which he believed supported his position.

Indeed, Dahlstrom's sixteen page response to the IRS position paper is a remarkable legal memorandum considering it was drafted by a layman. It cites well over fifty opinions from this Court and other courts and sets forth a persuasive argument in support of his position. It also *agreed* with the IRS as to the treatment of family trusts. Even a cursory review of that response reveals Dahlstrom's good faith belief in his position.

sponse to it.

As to the second issue, the record is clear that Dahlstrom did not monitor or even know which ALA members decided to create FTO's, utilized those FTO's for any particular purpose or with any particular business purpose or lack thereof, let alone know those people and/or entities which claimed tax benefits and the extent of those benefits pursuant to the utilization of those FTO's.

Thus, the Government's assertion is not necessarily correct, for the answers to the above two issues are necessary prerequisites to ascertaining the tax effect of transactions including FTO's. Assuming a valid business purpose or assuming resolution of the substance versus form controversy as advocated by Dahlstrom, the transactions involving FTO's would be treated for tax purposes as contemplated by Dahlstrom. Assuming a valid business purpose and even assuming resolution of the substance verse form controversy as espoused by the IRS, the transactions involving FTO's would be treated for tax purposes as contemplated by Dahlstrom. Only in an instance where there was no business purpose *and* the substance versus form controversy was resolved against the position advocated by Dahlstrom would the transactions involving FTO's not receive the tax treatment contemplated by Dahlstrom.[7]

Furthermore, the fact that the tax treatment might or might not ultimately coincide with that contemplated by Dahlstrom does not necessarily reveal specific intent. Indeed, the distinct possibilities set out above regarding the possible tax treatment of FTO's lend cre-

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[7]Even then, a separate inquiry into the validity of the deduction as well as the "gift" or "loan back" would have to be undertaken. In other words, the deduction could be valid, but the "gift" or "loan back" might be income, or the deduction could be disallowed in which case the "gift" or "loan back" would not be income. *Cf.* Pet. at 20-21.

dence to Dahlstrom's testimony at trial that utilization of FTO's was legal and that his position was based in good faith on his research into, *inter alia*, the case law of this Court, the Tax Court, and the Court of Appeals.

3. The Government asserts that "[t]he particular version of this scheme promoted by respondents employed foreign trusts as the vehicle for carrying out the transactions *and reducing the risk of detection* by the Internal Revenue Service." Pet. at 4. (emphasis added). The Government's assertion regarding the reduction of risk of detection is pure speculation unsupported, and in fact contradicted, by the record. Dahlstrom testified that foreign trust organizations were essentially identical to domestic business trust organizations. TR. 3210. According to Dahlstrom, he advocated utilization of FTO's because: (1) FTO's would classify as a foreign entity receiving income from a foreign source and hence not subject to income tax; (2) pursuant to 26 U.S.C. §2501 a gift of intangible property by a nonresident alien (i.e., FTO) to a U.S. citizen is not subject to any gift tax, TR. 3209-49; and, (3) pursuant to 26 U.S.C. §102, a gift of intangible property by a nonresident alien (i.e., FTO) to a U.S. citizen is not subject to any income tax. TR. 3209-49. Accordingly, the Government's effort to imply a motive to conceal is not supported by the record.

Also, the Government has neglected to inform the Court that the materials supplied by Dahlstrom and the trial testimony of ALA members and seminar attendees reflect that Dahlstrom advocated the filing of all necessary tax forms, such as 1040 NR's and 1001's, *cf.* TR. 809, 1126; Govt. Ex. 230 at p. 44, and that Dahlstrom stressed never to do anything fraudulently. TR. 535-36, 3666, 3737-39.

4. The Government asserts that "Dahlstrom or others conducting seminars advised participants to make payments to trust number two for *purported* business

expenses . . . " Pet. at 5. The Government is again ignoring the trial testimony. IRS Agent Perry testified that Dahlstrom gave examples of how trust number two could be utilized. TR. 1390-92. Those examples included: (1) sale and leaseback of equipment to and from trust number two; (2) consulting fees paid to trust number two; (3) sale and leaseback of patent or copyrights to and from trust number two; (4) purchase of supplies from trust number two; and, (5) employment of office personnel who work for trust number two. TR. 1390-92.[8] All of these examples are valid legal transactions which would create valid deductions if they were ordinary and necessary business expenses. 26 U.S.C. §162(a). For instance, the Howlett transaction, "another typical transaction", Pet. at 6, involved a transfer of certain property from Dr. Howlett to his trust number two for purposes of placing his assets outside the reach of potential creditors. TR. 1922, 1940-41. Dr. Howlett thereafter leased back those assets and claimed the lease payments as a business expense. TR. 1906-08.[9] The Government attempts to label these deductions "purported rental payments." Pet. at 6. However, in its motion for rehearing before the Ninth Circuit, the Government conceded that the deductions were not invalid. Govt. Motion For Rehearing at 2 n.2. This posture is inconsistent with the Government's efforts to now characterize the deduction as invalid in the initial instance: clearly the deduction was

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[8]A sixth possible use of trust number two involved a loan and interest charges. TR. 1392. However, Perry's testimony regarding this clearly reveals that he did not understand what Dahlstrom advocated in this regard. TR. 1392.

[9]Prior to 1979, Dr. Howlett had depreciated the property and took a deduction therefor. TR. 1940. Thus, to a certain extent, one type of deduction was substituted for a previous type of deduction (which had terminated in 1979 due to full depreciation of the property. TR. 1940).

valid, although the amount *might* be subject to a reduction.[10]

5. The Government asserts that "respondents also counseled [program participants] to employ various methods for avoiding detection by the IRS." Pet. at 7 (explanation added). However, none of the evidence cited by the Government reflects that *Dahlstrom* was engaged in any such activities. Indeed, the record affirmatively reflects that Dahlstrom never advocated any of the items the Government attributes to Morris, Durst and Riply. Pet. at 7.

6. The Government's factual statements concerning the ALA membership affidavit, Pet. 8, are supported by Govt. Ex. 212. *See also* Govt. Ex. 148, 256. The Government, however, ignores the clear tenor of the document, as it clearly states: " . . . nor will I ever aid any Federal or State governmental unit, Bar Association, agencies employees, etc. in the bringing of any charges, lawsuits, civil or criminal, for damages, unauthorized law practice, contempt or otherwise . . ." Govt. Ex. 146.

Furthermore, the Government ignores the fact that the affidavit reflects the First Amendment right to association, *cf. N.A.A.C.P. v. Alabama*, 357 U.S. 449 at 459 (1958), and the history of the ALA. As stated above, *supra* at paragraph 2, Dahlstrom was concerned with potential criminal contempt charges for unauthorized practice of law and civil injunctive actions. The record reflects that in addition to the Missouri action, Dahl-

[10]The substantive counts of the indictment when compared to the tax returns relating to each substantive count of the indictment clearly reflect that the Government was not contesting the validity of the deduction in the initial instance. Rather, the Government took the position that the amount of the deduction in any given taxable year had to be reduced by the amount of any "gifts" also received in the same taxable year. Given that position, the Government should be estopped from taking a contrary posture.

strom encountered additional problems in Washington (civil injunction), Govt. Ex. 259, TR. 2086-93, 2212-20, 2824-26, and in Texas. TR. 2086-93, 2212-20. These problems occurred prior to the August 1979 IRS position paper and were unrelated to the federal income tax ramifications of the ALA program. Those problems were the seed which gave rise to the ALA membership affidavit; an affidavit created *prior* to the IRS position paper.

Thus, the Government's attempt to lay the ground work for its subsequent attempt to convince the Court that the affidavit was sinister and evil, Pet. at 10, is not appropriate under the First Amendment or in light of the affidavit in its entirety.

REASONS FOR DENYING THE WRIT

1. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE GOVERNMENT'S PETITION

a. The two "Questions Presented" in the Government's petition, Pet. at (I), were not decided by the Court of Appeals. Moreover, the facts of record will not necessarily support a determination of the questions presented by this Court.

As stated by the Court of Appeals:

> "[t]he dispositive issue in this case is whether the evidence shows that appellants acted with the specific intent to violate section 7206(2). We have concluded, when viewed in the light most favorable to the government, that the evidence was insufficient to support a finding that appellants possessed a specific intent to violate section 7206 (2)." Pet. at 7a.

Even a cursory reading of the opinion below reveals that the Court considered and rejected three conten-

tions asserted by the Government as purportedly demonstrating specific intent: (1) the FTO's advocated by the ALA had no economic substance and were therefore blatant shams; (2) part IV of the ALA program (taxpayer's legal defense); and (3) statements made by Durst. Pet. at 7a.

As to the first contention, the Court of Appeals relied on a number of factors to reject the contention as proving respondents' specific intent: (a) there was no prior case law which would have put respondents on notice that in the context of FTO's substance controls over legal form; (b) the Government's expert witness testified that the trusts created through implementation of the ALA program were valid legal entities; (c) *Zmuda v. Commission*, 79 T.C. No. 714 (1982) could not be relied upon to give Respondents actual notice, even if applicable, because it was not decided until after respondents' trial; (d) the evidence at trial reflected that *even at that time*, the use of FTO's to save taxes was still a highly debatable issue and the IRS position paper issued in August 1979 postdated the material allegations of the indictment; and, (e) even assuming that respondents were negligent in continuing the ALA program after the dates of the IRS position paper, negligence did not amount to specific intent. Pet. at 7a-9a.

Based on the above five factors, the Court concluded that the legality of the ALA program "was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." Pet. at 9a. Thus, the Government's contention regarding substance versus form[11] was not sufficient to prove the requisite intent

[11]The Court of Appeals necessarily, although *impliedly*, held that: (1) substance does not always control over legal form; (2) the evidence failed to prove that the respondents did not know that substance always controls over legal form; or, (3) the evidence failed to prove that the respondents did not, in good faith, believe in the legality of the ALA program. In light of a subsequent

to violate the tax laws as to Counts II through VI. Pet. at 11a.

As to the Government's second contention, the Court noted that the Government "concedes . . . that the actions recommended in the taxpayer defense program were not unlawful (Gr. Br. p. 27)." Pet. at 9a. Accordingly, the Court could not conclude that "advocacy of various lawful actions [FOIA requests, questions authorized by the Privacy Act and reliance on the Fifth and Sixth Amendments, among other items] translates into proof that the appellants were aware of the illegality of their tax shelter program." Pet. at 9a-10a (explanation added).

The Court went on to note that even if the respondents knew that they were advocating illegality, the First Amendment would require a further inquiry before their advocacy could be made criminal. Pet. at 10a. According to the Court, the two prong test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), would have to be satisfied and nothing in the record indicated let alone proved that the respondents' advocacy contemplated imminent lawless action.[12]

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opinion of the Ninth Circuit, *Stewart v. C.I.R.*, 714 F.2d 977 at 987-988 (9th Cir. 1983), it appears that in the Ninth Circuit there are circumstances when form and form alone determines the tax consequences of a transaction. *Id.* at 988.

[12]This portion of the opinion - labeled an alternative holding by the Government, Pet. at 23 n.20 - is not necessary to the Court's holding that the evidence was insufficient to prove specific intent. At best, it is an alternative holding to the effect that the evidence was insufficient to show that the respondents' speech was not protected by the First Amendment.

It should be noted that the opinion makes no mention of the reason(s) why "nothing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action." Pet. at 10a. The Government, however, has affirmatively stated that the Court held that the ALA program was protected by the First Amendment" . . . because the actual filing of the

Thus, even disregarding the First Amendment, the Government's contention regarding the taxpayer's legal defense portion of the ALA was insufficient to prove the requisite intent as to counts II through VI.

As to the Government's third contention, the Court held that Durst's statements were admissible solely against Durst and not against the other co-defendants. Pet. at 10a-11a. Thus, Durst's statements did not prove the requisite intent as to counts II through VI.[13]

b. Given the foregoing, it is clear that the Government's first "Question Presented" was not decided by the Court below. The language of the opinion itself ("unsettled by any clearly relevant precedent" Pet. at 9a) directly contradicts the Government's language (precedent "directly establishing" Pet. at (I)).

Also, the Government has assumed that the language employed by the Court ("any clearly relevant precedent", Pet. at 9a) is the legal equivalent of "a prior statute, regulation, or court decision." Pet. at (I). The Government's assumption in this regard is far too restrictive in light of the factors which the Court determined did not prove respondents' specific intent. For instance, among the factors the Court considered was the trial testimony of the Government's expert witness (Krogue), to the effect that FTO's were valid legal entities, Pet. at 8a, and the trial testimony of the IRS Re-

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fraudulent returns was not 'imminent' at the time respondents counseled such action." Pet. at 8.

The Government has *created* a reason to explain why the Court held that the evidence was insufficient to prove that the respondents contemplated imminent lawless action. *See* text *infra*.

[13]The Government does not seek review of the reversal on count VII. Pet. at 8 n.8.

With regard to count I, the Government does seek review. Pet. at 22-23 n. 19. In so doing, the Government has impliedly conceded that their "Questions Presented" *are not raised* because the Court reversed on insufficient evidence.

gional Counsel (Hallett), to the effect that use of FTO's to save taxes was still highly debatable as of the time of trial. Pet. at 8a. The fact that the Court considered these two factors in connection with its holding that the legality of the ALA plan was "completely unsettled by any clearly relevant precedent", Pet. at 9a, is sufficient to demonstrate that the government has assumed too much and interpreted the opinion below too narrowly.

Furthermore, the Court's language relating to any clearly relevant precedent was an implicit rejection of the substance versus form argument proffered by the Government.[14] It was also an implicit acknowledgment of the evidentiary insufficiency relating to specific intent: The Government simply failed to muster sufficient evidence that respondents voluntarily and intentionally violated a known legal duty.

c. With regard to the second "Question Presented" by the Petition, Pet. at (I), there can be no question that the Court did not state *why* the respondents' advocacy was not imminent. The Government's assertion (contained in the second "Question Presented") is not supported by the Court's opinion.

Although the Government's assertion that the time lapse between the date of the advocacy and the date that the tax returns in question were filed *could be one* reason the Court held that the record did not *indicate*, let alone prove, that the respondents contemplated imminent lawless action, that assertion is mere *speculation* by the Government. As such, it does not raise a concrete factual issue which this Court should endeavor to decide.

Furthermore, the record will not support a determination of the Government's second question presented. In *Brandenburg v. Ohio*, *supra*, this Court established

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[14]See note 11, *supra*.

a two prong test to the effect that advocacy of law violation cannot be proscribed except " . . . where such advocacy is directed to inciting or producting imminent lawless action *and* is likely to incite or produce such action." 395 U.S. at 447 (emphasis added).

Thus, the Court *may* have impliedly held that the evidence did not satisfy either the first or second prongs of *Brandenburg*. In other words, the Court may have held with respect to the first prong that the respondents' speech did not advocate illegal acts or even if it did, that the advocacy was not a direct incitement to immediate lawlessness. Furthermore, with respect to the second prong, the Court may have held that no imminence was present because Dahlstrom and other respondents encouraged ALA members and seminar attendees to seek further advice from their own accountants and/or lawyers and/or perform independent research into the tax ramifications. TR. 727-28, 743, 979-84, 989, 1036, 1047, 1600, 1609, 1721, 1824-25, 1925. Or, of course, the Court may have held that neither prong was satisfied because as to each substantive count, the individual taxpayers and corporate representatives testified that none of the respondents knew the contents of the tax returns or had any direct, personal involvement with the preparation of the tax returns.[18] Indeed, there were numerous witnesses at trial who testified that they consulted with independent accountants or attorneys and either utilized or did not utilize the ALA program according to the advice they received from those independent accountants and attorneys. TR. 491, 510-13, 523-26, 614-23, 979-84,

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[18]It must be remembered that the Government attempted to prove that *but for* the respondents' advocacy, the FTO's would not have been utilized and deductions asociated therewith would not have been utilized, *not* that the respondents (except as to Durst as to count VII) had actual knowledge and personal involvement with the preparation and presentation of the tax returns.

995, 1047-50, 1609-10, 1822, 2420-30, 3658-61. Similarly, there were witnesses at trial who testified that they utilized the ALA plan and that their independent accountants eventually prepared their tax returns utilizing deductions obtained from utilization of FTO's. TR. 515-16, 1155, 1238, 1721, 1945-53.[16]

The point is that the record does not necessarily support a determination of the Government's second question presented due to the existence of numerous other reasons (firmly supported by the record) upon which the Court might have based its conclusion regarding the First Amendment.

2. EVEN IF THE GOVERNMENT'S "QUESTIONS PRESENTED" ARE RAISED BY THE OPINION BELOW, THE OPINION BELOW IS CORRECT

Assuming, *arguendo*, that Dahlstrom has failed to adequately demonstrate that the Government's "questions presented" are not raised by the opinion below, this Court should not exercise its certiorari jurisdiction due to the correctness of that opinion. *Cf. Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

As reflected above in Dahlstrom's initial reason for denying the writ, the Court of Appeals held that the evidence viewed in the light most favorable to the Government failed to prove beyond a reasonable doubt that the respondents possessed the requisite intent to violate the tax laws. As to Dahlstrom, this holding is unassailable for the following reasons.

a. Contrary to the Government's assertions, Pet. at 9-10, Dahlstrom: (1) never advocated use of "copy not" pens;[17] (2) never advocated the use of, provided or

[16]As to counts II, III, IV, and VI, the tax returns were prepared by the taxpayers accountant. TR. 1036-39, 1122-23, 1155, 1238, 1610, 1953, 2137-38, 2192-93.

[17]Dahlstrom testified that for a six month period of time (which coincided with the attempts of the IRS to obtain the names of ALA

utilized false social security numbers for any purpose; (3) never advocated the use of, provided or utilized fictitious names for bank accounts; and, (4) never advised that disclosure of books and records to the IRS *could* (not *would*, as the Government suggests, Pet. at 10) lead to problems with the IRS, let alone criminal prosecution. *Cf.* Pet. at 15a (Goodwin, J., dissenting). *See also* note 18, *infra*. Dahlstrom did draft and use a membership affidavit. However, as explained above in section 3(b)(6) of the STATEMENT, the Government's effort to characterize that affidavit as indicative of guilty knowledge is without merit, ignores the facts of record, and attempts to utilize an exercise of First Amendment rights to Dahlstrom's detriment.

b. Contrary to the Government's assertions, Pet. at 9, there is substantial doubt regarding the legality of the ALA program in light of the facts of record regarding the legality of the FTO's and the controversy regarding the substance over form doctrine. The ultimate resolution of the tax consequences of FTO's and deductions generated as a result of utilization of FTO's will necessarily have to be decided on a case by case basis, as explained above in sections 3(b) (1-4) of the STATEMENT. However, even if the ultimate resolution of the ALA program was now decided to be illegal *and* that it was illegal during the period alleged in the indictment, that resolution would not render the opinion below incorrect as to Dahlstrom due to the uncontroverted evidence of Dahlstrom's lack of specific intent and good faith.

c. The trial evidence reflects that Dahlstrom advocated following the law, that he believed, after much legal research into specific cases emanating from this

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members) he personally used a blue "copy not" pen to protect ALA members names. Dahlstom specifically testified this was an effort to maintain privacy and uphold the First Amendment right to association. TR. 3333-36, 3519.

Court and other Courts, that the law authorized the ALA plan, that exacting documentation had to be maintained as to each transaction to avoid bare form, and that he encouraged seminar attendees to tape record his seminars for their own accountants and lawyers to review along with the written materials he provided. He solicited and received the views of accountants and attorneys regarding the ALA plan, some of whom approved the plan and some of whom disagreed with the tax consequences Dahlstrom felt would legally ensue from the plan.[18] The printed materials Dahlstrom provided contained not only portions of court cases, but also excerpts from the IRS Service Manual; portions of which expressly authorized actions he himself had taken but which the Government attempted to characterize as obstructive and indicative of guilty knowledge.[19]

The Government's evidence regarding Dahlstrom's specific intent was so weak that the Government was forced to resort to the Missouri and Washington[20] civil

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[18]It should be noted that none of the attorneys or accountants who ever disagreed with Dahlstrom (including the IRS Regional Counsel) even mentioned the *possibility* of criminal prosecution or liability. Indeed, the record firmly supports the conclusion that the Government prosecuted Dahlstom due to his advocacy of the taxpayer's legal defense program, due to his refusal to accept the IRS position paper, and due to his sixteen page response to that position paper. *See* note 6, *supra*. *Only through criminal prosecution could the IRS attempt to stop Dahlstrom from educating people of their legal rights vis-a-vis the IRS and from advocating the position that economic substance does not always control over legal form.*

[19]For instance, Dahlstom advocated utilization of a tape recorder during IRS audits to protect the record. This was expressly addressed in the IRS manual. Govt. Ex. 146 at p. 63.

[20]Govt. Ex. 259, the Washington injunction, did not address any federal tax aspects of the ALA seminars. Similarly, the Missouri injunction did not address any Federal tax aspects *and* occurred more than two years before Dahlstrom began his advocacy of the ALA program relating to FTO's.

actions, Govt. Ex. 62 and 259, to try to show that Dahlstrom: (1) had violated the state laws which gave rise to the state civil injunctions; (2) had knowledge in 1977 (by virtue of the Washington injunction) that the program he was then advocating was illegal; and, (3) had ignored the Washington injunction, thereby violating a court order, and that this conduct was similar to Dahlstrom's alleged intentional disregard of the opinions of various people who had expressed some disagreement with the tax ramifications of the ALA program. Five separate times during the Government's case - twice during cross-examination, TR. 3546-48, 3638, and three times during final argument, TR. 4126, 4136, 4318-20 - the Government used the Washington injunction against Dahlstrom in an effort to convince the jury to conclude that since Dahlstrom may have had the intent to violate a state court injunction[21] he necessarily had the intent to violate the federal tax laws.

Similarly, the Government's evidence regarding Dahlstrom's specific intent was so weak that it had to utilize Dahlstrom's exercise and advocacy of First Amendment rights against him. Thus, Dahlstrom's personal utilization of FOIA and Privacy Act rights was used against him. Thus, Dahlstrom's advocacy of the propriety of using those same statutory rights as well as certain rights protected by the Fifth and Sixth Amendment was used against him.

Indeed, the Government's evidence as to Dahlstrom's specific intent was so weak that they were forced to and did successfully challenge over fifty documents (including letters, court opinions, etc.) that Dahlstrom

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[21]The Government conceded in its brief to the Ninth Circuit that the "acts described in the injunction are not patently unlawful . . ." Govt. Br. at 54-55. Thus, the Government went to extremes in urging the jury to conclude that a man who perhaps ignored a state court order to refrain from doing acts not patently unlawful would, with criminal intent, violate federal tax laws.

attempted to introduce to show his state of mind as to how and why he devised and justified the ALA program. Also, the Government also successfully challenged the single most accurate evidence of Dahlstrom's specific intent: videotapes and tape recordings of seminars[22] given by Dahlstrom long before he even became aware of the IRS position regarding his program.

In essence, the Government did everything it could to keep probative evidence of Dahlstom's actual intent and good faith from the jury. That action was compounded by the trial court's denial of defensive instructions on good faith reliance on counsel, reliance on case law, and properly drafted instructions on substance versus form.

In light of the Government's utilization of Dahlstrom's First Amendment rights and the fact that none of *Dahlstrom's* own acts and statements indicate a specific intent to violate the statutes involved herein, the doctrine of *strictissimi juris* is entirely appropriate and even warranted. *See Scales v. United States*, 367 U.S. 203, 231 (1961), *Noto v. United States*, 367 U.S. 248, 299-300 (1961). The doctrine, which literally translated means "of the highest right", arose in the above cited cases in this Court. In *Noto*, *supra*, this Court held that the individual defendant's criminal intent "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share." Similarly, in *Scales*, *supra* at 232, this Court held that the case called for "strict standards in assessing the adequacy of

[22]These tapes consisted of both types of seminars: the general two-day, four part ALA seminar and the informal CPA/Attorney seminar.

the proof necessary to make out a case of illegal advocacy." Application of this doctrine in the present case reveals that the Court of Appeals reached the correct result.

Moreover, even if the doctrine is not applicable, the Government's course of conduct at trial, coupled with the lack of evidence of Dahlstrom's specific intent and the overwhelming evidence of Dahlstorm's good faith, demonstrates the correctness of the opinion below.[23]

3. EVEN IF THE OPINION BELOW IS NOT CORRECT, THE RESPONDENTS' CONVICTIONS MUST BE REVERSED

Regardless of this Court's disposition of the Government's "Questions Presented", Dahlstrom's conviction on all counts must be reversed due to the Government's use of Dahlstrom's First Amendment rights to prove his alleged specific intent.

Count I of the indictment alleged, as one of the manner and means of the conspiracy, that the respondents attempted to impair and impede the IRS through their advocacy of the taxpayer legal defense portion of the ALA program.[24] At trial, the Government elicited testimony pertaining thereto in an effort to prove Dahlstrom's specific intent. Dahlstrom's personal utilization of statutory rights under the FOIA and Privacy Act was also elicited by the Government.

Dahlstrom's personal invocation of those statutorily protected rights falls well within the sphere of conduct protected by the First Amendment. *Cf. United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983). Also, Dahlstrom's advocacy of the propriety of reliance on those

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[23]These factors also demonstrate that the Government's statements regarding respondents' knowledge of the illegality of the program, Pet. at 9, 10, are entirely fallacious as to Dahlstrom.

[24]A copy of the indictment was also attached to the court's instructions to the jury. Cr. 341.

statutorily protected rights as well as rights encompassed within the Fifth and Sixth Amendments is likewise within the scope of First Amendment protection. *Brandenburg v. Ohio, supra.*

In light of the Government's utilization of Dahlstrom's First Amendment rights as substantive evidence of his alleged specific intent and the realization that the jury, in reaching a general verdict, was given no limiting instruction with regard to their consideration of that evidence, Dahlstrom's conviction must be reversed under this Court's opinions in *Street v. New York*, 394 U.S. 576 (1969) and *Gregory v. Chicago*, 394 U.S. 111 (1969).

4. THE OPINION BELOW ADDRESSED ONLY THE EVIDENTIARY INSUFFICIENCY OF RESPONDENTS' SPECIFIC INTENT

a. As demonstrated in Dahlstom's initial reason for denying the writ, the Court of Appeals decided only one issue: the sufficiency of the evidence of respondents' specific intent. As such, the Government seeks this Court to review the sufficiency of the evidence, notwithstanding its efforts to create "Questions Presented" which were not decided by the Court below.

In *Scales v. United States*, 367 U.S. 203, 230 (1960), this Court stated:

> "Only in rare instances will this Court review the general sufficiency of the evidence to support a criminal conviction, for ordinarily that is a function which properly belongs to and ends with the Court of Appeals."

See also United States v. Johnson, 268 U.S. 220, 227 (1925) where the Court stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts".

Furthermore, under *Burks v. United States*, 437 U.S. 1 (1978), there is a serious question of whether this Court can review the Court of Appeals decision without violating the Double Jeopardy Clause of the Fifth

Amendment.[25]

b. The trial testimony in this cause is over 3800 pages. The trial clerk's record contains over 350 multipage documents. Hundreds of documents were introduced at trial. Obviously, a review of the sufficiency of the evidence would consume a vast amount of judicial resources.

c. The Government's petition is essentially a restatement of the position it took in its motion for rehearing en banc before the Ninth Circuit. Neither the panel which delivered the opinion below nor any judge of the Ninth Circuit voted to grant the Government's motion for rehearing.

5. THE GOVERNMENT'S FIRST REASON FOR GRANTING THE PETITION IS WITHOUT MERIT

Dahlstrom asserts that the Government's first reason for granting the petition, Pet. at 9-22, is without merit. Promoters of unlawful tax shelter schemes do not form voluntary membership associations. They do not construct 7200 square foot educational facilities containing tax law libraries with over 5000 volumes and computer research facilities. They do not encourage seminar attendees to tape record everything they say. They do not video tape and tape record themselves for anyone to watch or listen to. They do not advise their clients to seek the advice of independent lawyers and accountants and/or to perform additional independent legal research. They do not prepare sixteen page legal responses to IRS position papers. They do not prepare monthly newsletters for dissemination to

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[25]Dahlstrom recognizes that *Burks v. United States*, *supra*, does not affirmatively answer this issue. Dahlstom further recognizes that *Burks*, *supra* at 5 noted that "[t]he United States has not cross-petitioned for certiorari on the question of whether the Court of Appeals was correct in holding that the Government had failed to meet its burden of proof with respect to the claim of insanity."

the members of their organization concerning tax cases emanating from the Supreme Court and legislative actions pertinent to their programs. They do not hire staff attorneys to do tax research and issue legal opinions.

a. With respect to part a of the Government's first reason to grant the petition, Pet. at 10-15, the Court did not hold, contrary to the Government's assertion, "... that the absence of a statute, regulation, or court decision directly on point precludes prosecution ..." Pet. at 10-11. *See* Dahlstrom's initial reason for denying the writ, *supra*. As such, the Government's assertion regarding the Court's holding is nothing more than a strawman which the Government then destroys. The Court did not, contrary to the Government's suggestion, Pet. at 11-12, alter or modify the willfulness requirement of Section 7206 (2). Rather, the Court held that the evidence failed to show a voluntary intentional violation of a known legal duty, Pet. at 9a, because the factors relied upon by the Government (i.e., substance versus form, taxpayer legal defense and Durst's statements) did not prove beyond a reasonable doubt that the ALA program was fraudulent *or* that respondents knew that it was fraudulent, if it was.

Since the Government asserts that "[i]t should be sufficient to prove that the promoters' program was fraudulent and that the promoters recognized it was fraudulent,"[26] Pet. at 11, the Court below essentially used the standard espoused by the Government and

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[26]In light of the first prong of the standard the Government submits is correct, i.e., that the program was fraudulent, it is difficult to understand the Government's assertion that "[t]he issue is ... not the objective certainty or uncertainty of the law." Pet. at 12. Regardless, Dahlstrom's testimony and the trial record as a whole unequivocally reveals that Dahlstrom believed the law to be unsettled in the substance versus form area. No evidence adduced by the Government as to *Dahlstrom's* own acts or statements contradicts that belief.

held that neither prong of that standard was satisfied.

Furthermore, the Government's effort to chastise the Court below for invading the province of the jury, Pet. at 13-15, ignores the factors set forth above in Dahlstrom's second reason to deny the writ, to wit: (1) exclusion of defensive evidence; (2) improper jury charges; and, (3) improper evidence allegedly showing specific intent (i.e., First Amendment rights, civil injunctions etc.).

b. With respect to part b of the Government's first reason to grant the petition, Pet. at 15-19, there is no conflict between the opinion below and *Ingredient Technology Corp.*, 698 F.2d 88 (2nd Cir. 1983), for the reason, *inter alia*, that in the present case, the evidence clearly reflected Dahlstrom's knowledge of the complexity of the law. Dahlstrom's knowledge of the complexity of the tax laws (as evidenced by the ALA materials, the conflicting legal opinions he received during his advocacy of the ALA program, and his interchange of letters and case law with the IRS Regional Counsel) reveals the obvious fallacy of the Government's assertion that there was no evidence that respondents genuinely thought that their advocacy was lawful and that their conduct indicated a subjective belief in the unlawfulness of their program. Pet. at 15. Similarly, Dahlstrom's knowledge of the complexity of the tax laws and his testimony that despite the complexity he believed that the ALA program was legal justified the introduction of expert testimony as to whether his belief that the ALA plan was legal was a good faith belief. *Cf. United States v. Ciardy*, 612 F.2d 1139, 1153 (9th Cir. 1980), cited in *Ingredient Technology Corp.*, *supra* at 97.

Also, the Government's statement that *United States v. Critzer*, 498 F. 2d 1160 (4th Cir. 1974), has no application to the instant case because there was "no evidence that respondents relied on statements or posi-

tions of the government," Pet. at 16, belies the evidence. Dahlstrom testified and introduced documents that proved that he was audited for 1972. The IRS subsequently issued a deficiency assessment in the amount of $820.16 as to Dahlstrom's personal use of domestic business trust organizations for the tax year 1973. TR. 3029-32. He also testified that the only difference between domestic business trusts and FTO's was the domicile of the trust and that his interpretation of FTO's was based, in part, on his prior research into pure trust organizations. TR. 3210-22. Finally, he testified and introduced documents that the above deficiency was ultimately withdrawn by the IRS in 1978. TR. 3103-04, 3587-93. Thus, Dahlstrom did in fact rely on the IRS position (with regard to their tax treatment of his personal business trust organizations) when he continued to advocate the ALA program after 1978.[27]

Thus, since there was evidence of Dahlstrom's actual knowlege of the complexity of the tax laws, evidence of Dahlstrom's good faith belief in the legality of the ALA program and evidence of Dahlstrom's reliance on the IRS, the Government's attempt to create a conflict is without merit.

c. With regard to part c of the Government's first reason for granting the petition, Pet. at 19-22, the Government has reiterated its substance over form argument. It is sufficient for purposes of this response to

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[27]It should also be noted that as of the time of trial over twenty tax court cases were pending regarding deductions generated pursuant to the utilization of FTO's. TR. 3757, 3929. As to those cases, the IRS had been inconsistent, seeking a negligence penalty as to some and a civil fraud penalty as to others. TR. 3929-30. Yet, in no case prior to the instant indictment had the Government initiated a criminal fraud prosecution.

Similarly, the Government did not prosecute Dahlstrom for his personal use of FTO's. Rather, in 1983 the IRS proceeded against Dahlstrom in Tax Court for deficiencies due to his personal use of FTO's.

note that the ultimate resolution of this issue does not negate the evidence that Dahlstrom, based on his legal research, believed in good faith that there is no absolute rule of substance over form.

6. THE GOVERNMENT'S SECOND REASON FOR GRANTING THE PETITION IS WITHOUT MERIT

The Government's second reason for granting the petition, Pet. at 23-30, relates to the Government's second "Question Presented". Pet. at (I). Since the second question is not raised by the opinion below and necessarily depends on an assumption not contained in the opinion below (*see* note 12, *supra*, and part c of Dahlstrom's initial reason for denying the writ), Dahlstrom's response will be very limited.

a. With regard to part a, Pet. at 23-26, the most important point is that the Government is advocating *strict liability* for an unlimited period of time after a speaker's advocacy. Unless the substantive topic of a speaker's advocacy is going to control the extent of First Amendment protection, the Government's position must be rejected. Even if the substantive topic is going to control, the First Amendment allows a speaker to advocate *known* law violations unless additional factors are present. *Brandenburg v. Ohio*, *supra*. The Government's posture, in a nutshell, is repugnant to the origins of the First Amendment.

b. As to part b, Pet. at 27-28, the Government has not and can not cite any precedent that holds that Dahlstrom's advocacy to ALA members and potential members is commercial speech, for clearly it is not commercial speech. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

c. As to part c, Pet. at 28-30, the new IRS regulations relating to abusive tax shelters and promoters thereof (promulgated by the IRS since the opinion below was delivered) will eliminate all of the problems the Government *imagines* the opinion below will gen-

erate. *See* Rev. Proc. 83-78, Sections 1-8. Indeed, those regulations provide, *inter alia*, for notice by the IRS to promoters of the tax shelter program of the IRS position, an opportunity for the promoter to respond thereto, and devices for the IRS to prevent the continuation of the promotion of an abusive tax shelter. Although the Government has noted the 1982 legislation under which these regulations were promulgated, Pet. at 29 n. 24, the Government has failed to even mention Rev. Proc. 83-78.

Even a cursory review of Rev. Proc. 83-78 reveals that it renders moot the ramifications that the Government asserts the opinion below will generate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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April 10, 1984

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IN THE

SUPREME COURT OF THE UNITED STATES

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CLERK

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

BRIEF OF RESPONDENT HIRAM E. CONLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Conley submits that neither of the questions stated at page (I) of the Petition properly arises in this case. The only question which would arise on this record, had the Government chosen to state it, is whether the Court of Appeals erred in finding insufficient evidence to support the conviction.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1297

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

BRIEF OF RESPONDENT HIRAM E. CONLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hiram E. Conley requests that the petition for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

OPINION BELOW

The decision of the Court of Appeals (Pet. App. 1a-18a) is reported at 713 F.2d 1423.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1983. A petition for rehearing was denied on November 8, 1983. On February 21, 1984, the time to file briefs in opposition to the petition for a writ of certiorari was extended to and including April 11, 1984.

STATUTE INVOLVED

Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> § 7206. Fraud and false statements
>
> Any person who -
>
> * * *
>
> Aid or assistance
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

In 1976, Respondent Dahlstrom started an organization called the American Law Association ("ALA"). Members of the American Law Association purchased memberships and were entitled to receive instructions and materials relating to the ALA tax shelter program. Typically, members attended a two-day seminar. In late October or early November, 1976, Respondent Conley attended a meeting of the ALA at the University of Alaska. (TR 476) The presentation included a discussion on how to avoid probate and the protection of "one's estate through a pure trust organization." (TR 478-79, 494, 95) Conley had shortly before that time met Dahlstrom at a seminar in Seattle. (TR 3609) Subsequent to the meeting in Alaska, Conley traveled to Texas, spent two or three days reviewing the program, and asked for

several cites on court decisions, revenue rulings and code provisions. (TR 3611)

Conley also visited the ALA multi-volume library and even visited the library at the nearby Texas A&M University for the purpose of reviewing the ALA program. (TR 3611)

Conley was also presented with and reviewed a memorandum opinion from attorney Steve Allen (DX A-V) which was a lengthy legal opinion concluding that the ALA program as presented by Mr. Dahlstrom was not in conflict with existing federal tax law. (TR 3614)

Mr. Conley had occasion to review correspondence from attorney Royal Bouschor, II, regarding certain language of the trust organization being utilized by the ALA. (TR 3615) Mr. Bouschor is an attorney who had represented Mr. Conley in the past and who gave advice to Conley regarding the legality of the ALA program. Mr. Conley, on affidavit to the Court, requested authorization for payment of travel funds and fees in order that Mr. Bouschor could testify as an anticipated reliance witness. (TR 3400-07) The court refused such authorization. That refusal was raised as a ground of error in the appeal below. (Res. Br. 43)

Mr. Conley became acquainted with Mr. Neil Nordbrock in April of 1977. Nordbrock was a practicing accountant who spent considerable time with Mr. Conley at various ALA seminars and meetings including meetings held solely for CPA's and lawyers interested in the ALA program. (TR 3704-3705) Tape recorders were generally allowed at all of the ALA meetings and discussions. (TR 2252, TR 3707) Mr. Nordbrock testified as to his conviction that Conley believed the ALA program to be legal.

Respondent Conley was charged with violation of the general conspiracy statute Title 18 U.S.C. § 371 (Count I) and with

violation of 26 U.S.C. §§ 7206 (Counts II, VI, VII).[1] Those indictments resulted from the filing of returns by three individuals who, after some contact with Conley, became members of the ALA, and filed tax returns utilizing the program advocated by the association.

Several members of the ALA testified concerning their attendance and participation in the ALA seminars and regarding the information they had received through the program. (Bean, TR 759-72, Rice, TR 2096-2100, Austin, TR 1667-74, 1698, 1704-16; Rickets, TR 2254-59) Without exception, each stated they had no reason to believe that Conley did not sincerely believe in the legitimacy of the program. Each testified that the tax returns filed had not been seen or reviewed by Mr. Conley. Mr. Conley did not assist anyone in the preparation of a return. (TR 2149)

Undercover agent Walter Perry, acting under the alias of Vince Paoli (TR 1344), tape recorded several telephone conversations[2] and personal meetings with Respondent Conley.[3] Mr. Conley consistently expressed to Mr. Perry his belief that the ALA program was legal.

In early 1982, convictions were returned, sentencing imposed, and an appeal was initiated.

The Court of Appeals vacated the judgment as to all counts. This Petition followed.

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[1]Durst was charged only in Count I (18 U.S.C. 371, conspiracy) and Count VII (18 U.S.C. 7206). Conviction under Count VII was set aside because the return "was never filed with the IRS [and] never intended to represent Dr. Rickett's true return." (Pet App. 11a) Review is not sought on this issue (Pet App. 8, ftnt. 8) Durst's statements thus become further inadmissible against the alleged co-conspirator. (Pet App. 11a)

[2]Tapes relating to those calls are as follows: (1) 5:35 p.m. 12/6/78 (GX 235-A); (2) 11:16 a.m. 12/9/78 (GX 235-B); (3) 8:10 a.m. 12/12/78 (GX 235-C); (4) 8:07 a.m. 12/15/78 (GX 235-F); (5) 3:31 p.m. 12/15/78 (GX 235-H).

[3]Government Exhibit No. 242 (transcript is 242-A) was played to the jury (TR 1429-32) and dealt with Dr. Rickets trust and the possibility of obtaining future members of the ALA. (TR 1429)

1. NO QUESTION OTHER THAN SUFFICIENCY OF THE EVIDENCE WAS DECIDED BELOW OR COULD BE REVIEWED IN THIS COURT.

This case is not one that requires the exercise of the Court's extraordinary and discretionary jurisdiction. The issues herein, though identified otherwise by petitioner, are factual. Quite simply, this case is a "sufficiency of evidence" case. It is incumbent on the Court to deny hearings on all but the most exceptional cases, otherwise the Court cannot properly exercise its judgment on the merits in those cases in which review is granted. It is axiomatic that this Court's task is to settle legal issues and not factual ones.

The Court has specifically stated, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.ed. 925, 926, 45 S.Ct. 496.[4] Mr. Justice Holmes in Johnston, for a unanimous court 50 years ago, summarized the practice of the court in abstaining from exercising actual discretion except where there are "special and important reasons" which imply that the examination of the Court will reach to a problem beyond the "academic or episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 99 L.ed. 897, 901.

In Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508. L.ed. 413, the Court concluded that a writ based upon an alleged "grave question of vital importance" must be dismissed when the court later concluded that the case was one requiring an examination of the sufficiency of the evidence. A unanimous court stated:

> The argument developed that the controverted question was whether the evidence sufficed . . . [is] primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed, would not have moved us thereto . . . . Obviously, it is impossible for us critically to examine so many records before ruling upon applications and we must rely very largely upon preliminary papers.

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[4]The Court refused review of the Circuit Court's reversal of a jury conviction for tax evasion.

Even though a federal question raised may be of substance in the sense that it may present an "intellectually interesting and solid problem," nevertheless the Court still recognizes that it does not sit for the "benefit of the particular litigant"; ibid. Not only will the granting of a writ not be warranted merely to review the evidence, neither will it be warranted to draw inferences therefrom. General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 82 L.ed. 1273.

A review of certiorari is not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefore. Rule 17 of the Revised Rules of the Supreme Court.

The Rule in not granting certiorari to review evidence is a wise one and is universally applicable to cases wherein review is sought. Where the only thing in controversy is an appraisal of the facts on which the Supreme Court is asked to make a second guess or substitute its assessment of facts for that of the court below, then such request is in violation of the "special and important reasons" provisions of Rule 17.

The Court of Appeals concluded that the uncertainty and fair debatability of the use of foreign trusts for tax minimization undercut the Government's attempt to prove criminal intent. In addition, other undisputed evidence plainly showed the absence of any knowing violation by Respondent Conley.[5]

Dahlstrom testified that Conley read and reviewed a presentation that included numerous cases, analysis of statutes,

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[5]The Petitioner argues that the Respondents "knew and understood" that the [ALA program] was illegal because of (1) the advocacy of the use of "copy not" pens, false security numbers, and false names; (2) the use of a statement of noncooperation with the Government; and (3) isolated, damaging statements by Respondent Durst. (Pet. App. 9-10)

Respondent Conley neither participlated in nor was aware of any of these with the exception of the utilization of the statement of noncooperation described above.

treaties, and attorneys' briefs (DX AV), statements and papers which concluded that the ALA program was legal under the tax laws of the United States. (TR 3614) Further, accountants Nordstrom and Mohs both testified that Mr. Conley had discussions with them relative to the program and its validity. The Respondent Conley in forming his belief as to the legality of the program, traveled to Texas, viewed a 7200 square foot building erected by the ALA, utilized a multi-volume library and sought the advice of accountants and attorneys. These actions are not actions of illegal tax protestors or sham promoters. It was eminently reasonable for Respondent Conley to believe in the legality of the program and as the Court of Appeals concluded, there was insufficient evidence to demonstrate that he "willfully violated a known duty."

The Government has not disclosed these and other salient facts which are highly material to the Court of Appeals' conclusion that evidence of intent was lacking.[6]

The Court of Appeals reviewed thousands of pages of testimony, hundreds of pages of exhibits and in excess of twenty hours of electronic tape-recorded conversations.[7] To pass on the Court of Appeals' conclusion, this Court would have to perform that same task of evidentiary review. This Court should not undertake the chore of further reviewing the sufficiency of the evidence.

---

[6]Some commentators believe that the Government historically tends to oversimplify a case both in the interest of economy and as a matter of effective presentation to the court. One commentator concludes that the Government's petitions are often subject to attack on the basis that the court, if it grants certiorari, will face facts different from those set forth in the Solicitor General's petition. Prettyman, Opposing Certiorari In The United States Supreme Court, 61 Va. L. Rev. 197 (1975). That observation certainly applies here.

[7]The entire panel, including Judge Goodwin, who originally dissented (Pet. App. 14a-18a), voted to deny the petition for rehearing and to reject the suggestion for hearing en banc. The full Ninth Circuit Court was advised of the suggestion for rehearing en banc and no active judge of the court requested a vote for rehearing. (Pet. App. 19a)

2. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

The Government plainly mistakes the opinion of Justice Alarcon and Justice Ferguson when it suggests that they hold there can never be an indictment and conviction in "the absence of a prior statute, regulation, or court decision directly establishing the illegality of the scheme." (Pet. App. (I)) In fact, the decision below rests on insufficiency of the evidence as a whole to show intent:

> The dispositive issue in this case is whether the evidence shows that the appellants acted with the specific intent to violate Section 7206(2). (Pet. App. 8a)
>
> . . .
>
> We conclude that proof of the requisite intent . . . is not shown in this Record. (Pet. App. 11a)
>
> . . .
>
> The government's failure to present evidence as to the appellant's specific intent to violate the underlying substantive count requires us to set aside the convictions premised upon 18 U.S.C. § 371. (Pet. App. 13a)

The Court of Appeals correctly assessed the case as one of sufficiency. Petitioner herein alleges that the facts prove that all appellants acted "willfully" in violation of Section 7206; that is, their acts were "voluntary, intentional violations of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.ed.2d 12 (1976); United States v. Drape, 558 F.2d 22, 26 (1st Cir. 1982). The standard set by the Ninth Circuit for a determination of a "willful" violation under the statute "requires proof of a specific intent to do something which the law forbids," and more than a showing of "careless disregard for the truth is required." United States v. Brooksby, 668 F.2d 1102, 1104 (9th Cir. 1982).

In any event, the lower court held that in light of substantial professional opinion supporting the validity of the ALA program, including the opinion of the Government's own expert

witness, it was impossible for defendants to possess the requisite criminal intent. Nothing in the opinion below suggests that only specific on point statutes, regulations, or cases are required in every criminal tax fraud case before intent can be established.

The Government's petition sets up and knocks down a straw man. The Government actually lost its case below because the ALA foreign trust program presented a new and untested interpretation of the tax laws, whose validity was at least debatable.

It is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- "lacks the requisite intent to violate it." United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal prosecution under Section 7206 presents:

> [A] tax question [that] was completely novel and unsettled by any clearly relevant precedent. A criminal proceeding . . . is an inappropriate vehicle for pioneering interpretations of tax law. United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979).

In Garber, evidence was presented that those with whom the defendant dealt had advised her that certain proceeds were taxable and should be reported. She chose not to rely upon them, was convicted, and the court overturned the conviction.

Petitioner would have this Court believe that the decision below conflicts with decisions in other circuits because the decision allegedly holds, as a matter of law, that the "absence of a prior statute, regulation or court decision directly establishing the illegality of the scheme precludes a finding of willfullness as a matter of law." (Pet App. I) At this point we neither concede nor argue the correctness of that proposition.[8] The Court of Appeals made no such holding.

---

[8]Respondent is informed that co-respondents will more fully address the propriety of this question.

3. NUMEROUS ADDITIONAL GROUNDS OF ERROR WERE NOT DECIDED BELOW. RESOLUTION AND CONSIDERATION OF THOSE ISSUES WILL BE UNWARRANTLY BURDENSOME.

If this Court does accept jurisdiction, numerous areas of error presented below must still be determined; many of which may be dispositive. As was recently pointed out by the dissenting Justices in Scherk v. Alberto-Culver Co., 94 S.Ct. 2449, 2460 (1974), respondent has the right to urge any argument that supports the judgment in his favor. See United States v. American Ry. Express Co., 265 U.S. 425, 435-36 (1924). Not only does the respondent have the right to urge reconsideration of contingents rejected below, but also of those matters which were not passed upon by the courts below.

The Court of Appeals below reached its decision based on the sufficiency of the evidence and thus had no need to address the grounds of error submitted by Respondent Conley, which grounds included (1) error relating to the charge to the jury (Ground of Error No. 1a to 1m); (2) error in refusing to grant a motion for change of venue pursuant to 18 U.S.C. 3237(b); (3) error in refusing to authorize payment of travel funds and fees for Mr. Conley's anticipated reliance witnesses; and (4) joinder in grounds of error of other defendants, including, inter alia, exclusion of exhibits and testamentary evidence and inappropriate admissions of other evidence.

Respondent intends to exercise his rights to argue those grounds of error not decided by the Court of Appeals.

CONCLUSION

The Government's Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this 11th day of April, 1984.

BEUS, GILBERT, WAKE & MORRILL

By _____

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15.2.19

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

APR 20 PAGE 2

No. 83-1297

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW the Respondent, Hiram E. Conley, by and through his attorney of record, Merwin D. Grant, and pursuant to Rule 46, United States Supreme Court Rules, presents his motion for leave to proceed in forma pauperis, and as grounds therefore, would respectfully show this Honorable Court the following:

I

The Solicitor General, on behalf of the United States, has petitioned this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. (United States Court of Appeals, Ninth Circuit, No. 82-1138.)

II

That Respondent's attorney of record, Merwin D. Grant, was appointed as counsel for Respondent under the Criminal Justice Act of 1964, as amended, by Magistrate

J. Weinberg, United States District Court, on March 12, 1982.

III

That leave to proceed in forma pauperis was sought in the United States Court of Appeals for the Ninth Circuit and leave was granted.

WHEREFORE, premises considered, the Respondent, Hiram E. Conley, respectfully requests that this Court enter an Order authorizing him to proceed in forma pauperis in this action.

RESPECTFULLY SUBMITTED this 11th day of April, 1984.

BEUS, GILBERT, WAKE & MORRILL

By _____

Merwin D. Grant
Suite 1000 United Bank Tower
3300 North Central Avenue
Phoenix, Arizona 85012
Attorney for Respondent
Hiram E. Conley

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1297

UNITED STATES OF AMERICA, PETITIONER

v.

KARL L. DAHLSTROM, ET AL., RESPONDENTS

RESPONDENT GAZE DURST'S STATEMENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Gaze Durst joins in the arguments and authorities presented by co-defendant Carl Dahlstrom in his Brief in Opposition, and in so doing, elects not to brief those issues separately.

DATED this 10th day of April, 1984.

Respectfully submitted,

Irwin H. Schwartz
Attorney for Respondent Durst

CERTIFICATE OF SERVICE

I, Irwin H. Schwartz, do hereby certify that the attached document was mailed, postage prepaid, on April 10, 1984 by depositing same in the United States mail to the following counsel for the respective parties:

Hon. Rex. E. Lee
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Washington, D.C. 20530

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Merwin Grant, Esq.
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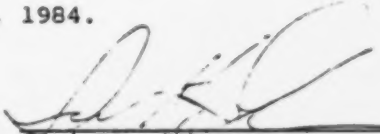
DATED this 10th day of April, 1984.



Irwin H. Schwartz
Attorney for Respondent Durst

B

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1297

UNITED STATES OF AMERICA, PETITIONER

v.

KARL L. DAHLSTROM, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent Gaze Durst moves to proceed in this Court in forma pauperis pursuant to Rule 46 of this Court's rules. Respondent was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006(A), in both the trial court and the U.S. Court of Appeals for the Ninth Circuit.

DATED this 10th day of April, 1984.

Respectfully submitted,

Irwin H. Schwartz
Attorney for Respondent Durst

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NO. 83-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v.

R. BRUCE RIPLEY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER, THE RETURN PREPARERS, TAX CONSULTANTS, ATTORNEYS, AND/OR ACCOUNTANTS SHOULD BE PROSECUTED BY THE GOVERNMENT IN THE ABSENCE OF "FAIR NOTICE" PROVIDED BY PRIOR STATUTE, REGULATION, OR COURT DECISION?

2. WHETHER THE GOVERNMENT PROVED, BEYOND A REASONABLE DOUBT, THAT R. BRUCE RIPLEY'S ADVOCACY OF IDEAS WAS THE PROXIMATE CAUSE OF THE PRESENTATION AND THE FILING OF ALLEGEDLY FALSE AND FRAUDULENT INCOME TAX RETURNS?

PARTIES TO THIS PROCEEDING

In addition to the parties shown in the caption of this case, Karl L. Dahlstrom, David J. Morris, and Gaze Durst were Appellants below and are Respondents herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. 83-1297

UNITED STATES OF AMERICA,
Petitioner

v.

R. BRUCE RIPLEY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Karl L. Dahlstrom, et al., v. United States*, 713 F.2d 1423 (August 24, 1983). The Judgment of the United States District Court for the Western District of Washington has not been reported.

JURISDICTION

As stated above the Judgment of the Court of Appeals was entered on August 24, 1983. A Petition for Rehearing, filed by the United States, was denied on November 8, 1983. On December 30, 1983, Mr. Justice Rehnquist extended the time in which to file a Petition for Writ of Certiorari by the Government to and including February 6, 1984. Thereafter, by Application of David Bottsford, the time within which all Respondents could respond to the Petition of the United States was extended to April 11th, 1984. The jurisdiction of this Court has been invoked pursuant to Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

Section 7206. Fraud and False Statements

> Any person who willfully aids or assists in, or procures, counsels or advises the preparation of presentation under, or in any connection with any matter arising under, the Internal Revenue Laws of a return, Affidavit, Claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, Affidavit, Claim or document;
>
> Shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00 or imprisoned not more than three (3) years, or both, together with costs of prosecution.

STATEMENT OF THE CASE

Respondent, R. Bruce Ripley, was one of the Defendants in a "test case" brought by the Tax Division of the United States Department of Justice in the United States District Court for the Western District of Washington, Seattle Division. He was charged, along with four other Defendants, with conspiracy to defraud the United States in violation of Title 18 U.S.C. Section 371. Ripley was convicted on Counts 1, 3, and 5 of the Indictment, but was acquitted on all other Counts, of fact pointedly ignored in the Government's Statement.

The Government's analysis of the evidence, in its "Statement" is highly inflammatory, self-serving and not supported by the record. Earlier on in its diatribe the Government attempts to besmirch the American Law Association as " . . . nominally a membership organization, it was controlled by Dahlstrom . . .". (Pet. for Writ, Page 3, Note 3) The record in this case refutes this attack for this Court has defined an association as follows:

> "An association is said to be *any* group of persons whether temporarily or permanently associated together, for joint action or advancement of views on any subject.". *Sweezy v. New Hampshire*, 354 U.S. 231 (1957).

After this proverbial "stubbing of the executive toe" the Government then recounts, in checkered fashion, its own version of the evidence which bears little, if any, connection with the alleged deeds or misdeeds of Respondent Ripley. While the Government recounts, in minute detail, the advice, counseling, and activities of the first Respondent Dahlstrom, and then, Respondent Morris, Respondent Ripley is directly accused of the following:

1. Advocating the use of blue "copy-not" pens to "tax shelter" purchasers so that their checks could not be microfilmed by their banks.

2. Giving seminars, as Vice President of the American Law Association, where various benefits enuring to membership in the association were discussed.

Completely absent from the Government's version of the facts was any reference to specific advice, attributable to Appellant Ripley, which was acted upon and resulted in fraudulent overstating of deductions on any purchasers' or members' income tax return.

In fact, a fair reading of the record belies the Government's claim concerning the blue pens. One of the Government's witnesses, Clyde Eastwood, indicated the matter of the blue pens was not raised by Ripley during his seminar but, instead, was mentioned by a member of his audience who had seen the Sixty Minutes Program "None of Your Damn Business". (Tr. 1591). Dr. Kuhns, another Government witness, indicated that the pens were mentioned in passing and were " . . . not something that we had to use . . .". (Tr. 1812). The consistent theme of these Government witnesses was borne out by Dr. Austin, who also indicated that the use of the pens was not a mandatory requirement advocated by Ripley's seminar. (Tr. 1739). Another Government witness who supposedly received such advice from Ripley, Dr. James Howlett, could not even identify the Respondent. (Tr. 1842).

Reference to John Wilbur Ricketts, and the advice he received from Respondent Durst, is particularly inappropriate in reviewing the sufficiency of the evidence as to

Ripley's conviction since Ripley was acquitted on the substantive Count pertaining to him. (Pet. for Writ, Page 7).

Also noticeably lacking in the Government factual review was any citation to the transcript of testimony, Exhibits, or record below, which would establish Respondent Durst's membership in the A.L.A. In reality, Durst was an independent accountant, was not a member of the A.L.A., had no connection whatever with Respondent Ripley, or his seminars, and could make no statements binding on Ripley's interest.

The controls on the membership, calculated to insure associational privacy, was not promulgated or implemented by Respondent Ripley.

All of these associational activities were specifically noted as legal by the Court of Appeals in its Opinion, a fact not challenged here. This concentration on legal activity by the A.L.A. and Respondent Ripley, in particular, is particularly disturbing, especially so in light of the complete absence of concrete evidence linking Ripley's "advocacy of ideas" to the preparation and/or filing of a false or fraudulent return containing overstated deductions.

The Government grossly misstates and unfairly maligns the holding of the Court of Appeals in reversing the convictions. The Government's comment "the Court did not question the sufficiency of the evidence that the Respondent had aided or assisted in the preparation of false and fraudulent tax returns" is nothing more than self-serving fantasy, as is its assertion that the Court did not " . . . question the adequacy of the evidence that

Respondents actually believed that their scheme was false and fraudulent . . .". (Pet. for Writ, Page 8). A fair reading of the Opinion of the Court of Appeals establishes that the majority viewed the Government's evidence as deficient in both categories. The prosecution did not prove that Ripley had "fair notice" that the deductions advocated by the A.L.A. *were inherently illegal.* In fact, the Government never proved that they were, even in his criminal case. Without notice of the *inherent illegality* of the deductions advocated in the seminar program, formulated by Respondent Dahlstrom, Ripley did not have the requisite intent to violate the substantive Statute and the Government's evidence was insufficient to prove guilt beyond a reasonable doubt.

The record below is rife with testimony, from the Government's own witnesses, that Respondent Ripley believed in the legality of the deductions and tax planning advocated. The Government, simply put, was unable to prove prior receipt of "fair notice" by the Respondent. The Government's citation[1] of cases purportedly concerning "similar schemes" merely underscores the fundamental unfairness of this ill-conceived prosecution.

---

1. The Government cites *U.S. v. Landsberger*, 692 F.2d 501 (C.A. 8, 1982); and *Zmuda v. Commissioner*, 79 T.C. 714 (1982), Appeal pending, No. 83-7374 (C.A. 9 1983) as "subsequent" authority invalidating the use of foreign trusts to reduce domestic taxes. In *Landsberger* the purported promoter was sued for preliminary and Permanent Injunction to prevent "recurring violations". In *Zmuda* the issue of "economic substance" as it related to the economic dealings between various trust entities was examined by the Tax Court and resolved against the taxpayer. The Court of Appeals expressly noted that the Government's reliance on *Zmuda*, for provision of fair notice to the Respondents was misplaced since *Zmuda* was rendered subsequent to the events and activity complained of in the Government's Indictment. Neither *Landsberger* nor *Zmuda* was a criminal case.

REASONS FOR DENYING THE PETITION

1. **WHETHER THE RETURN PREPARERS, TAX CONSULTANTS, ATTORNEYS, AND/OR ACCOUNTANTS SHOULD BE PROSECUTED BY THE GOVERNMENT IN THE ABSENCE OF "FAIR NOTICE" PROVIDED BY PRIOR STATUTE, REGULATION, OR COURT DECISION.**

2. **WHETHER THE GOVERNMENT PROVED, BEYOND A REASONABLE DOUBT, THAT R. BRUCE RIPLEY'S ADVOCACY OF IDEAS WAS THE PROXIMATE CAUSE OF THE PRESENTATION AND THE FILING OF ALLEGEDLY FALSE AND FRAUDULENT INCOME TAX RETURNS.**

The Government begins its legal argument with a desperate human cry. Its ability to enforce the tax laws effectively has been mortally wounded by the slings and arrows of outrageous due process. The mighty engine of executive and administrative tax collection has somehow mired in the—incomprehensible to it—quagmire of the First Amendment.

The Government, in its Petition for Writ, likens the Respondents to jazz musicians who, apparently, are to be jailed for their "artistic unwarranted exercise of artistic license". Far from presenting the subject, in a serious vein, the Government likens the studied efforts of this nation's tax advisory and tax consultant industries to the "artistry of tax evasion".

Respondent Ripley suggests that such frivolity is not only out of place but demonstrative of a studied and

growing Government contempt for the tax planning industry itself.

The Government's inexorable and continuing assault on the fundamental values of due process, and the First Amendment, far from being a humorous diversion, instead constitutes a serious Constitutional malignancy which "sounds a sour note" in the necessary counterpoint between a sometimes over-zealous Revenue and the well-informed citizenry.

Respondent Ripley also rejects the Government's statement that its evidence established the patent illegality of his alleged "tax shelter" program or that he ". . . knew and understood that it was illegal . . .". There is simply no evidence linking Respondent Ripley with "fictitious names for authorized signatures on bank accounts . . ." or ". . . false social security numbers . . .". As for the reluctance to show books and records attributed to Ripley, the Government's own witness, Dr. Austin, indicated that he was instructed to turn over his books and records if the Internal Revenue Service obeyed the law in seeking their production. (Tr. 1746).

The discussion contained on Page 10 of the Government's Petition for Writ should be disturbing to any fair minded jurist. After initially insulting both the intelligence and integrity of the panel of the Ninth Circuit rendering the Opinion below, the Government scrivener then goes on to state:

> "According to the Court, it does not matter whether the Defendant has manifested an intent to assist in defrauding the Government; the absence of a prior statute, regulation, or Court decision in point precludes criminal prosecution. The Court thus effec-

> tively removed the threat of criminal liability from any tax evasion counselor creative enough to devise an as-yet-unchallenged variety of tax fraud.".

A clear reading of the Opinion of the Court of Appeals does not reveal such a result. Obviously, a so-called "variety of tax fraud" could be unchallenged and yet be subject to "clearly relevant precedent" which would provide "fair notice". To argue otherwise would be to ignore the Government's self-conflicting argument that prior civil tax cases are to be relied upon in determining whether prior "fair notice" has actually been given.

The Government cites a series of cases to support its contention that ". . . the Courts have frequently sustained criminal tax prosecutions based on the general concept of sham transactions, provided there is evidence of actual fraudulent intent . . .". Citing *U.S. v. Baskes,* 687 F.2d 165 (7th Cir. 1981); *U.S. v. Conforte,* 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *U.S. v. Turkish,* 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *U.S. v. Clardy,* 612 F.2d 1139 (9th Cir. 1980); *U.S. v. Freuhauf Corp.,* 577 F.2d 1038 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *U.S. v. Raub,* 177 F.2d 312 (7th Cir. 1949).

None of the above cases, after close examination, conflict with the decision of the Court of Appeals below. *Baskes,* far from involving unique and "highly debatable" issues of tax law concerning foreign trusts, instead addressed the well settled principles endemic to fraudulent commodity straddles. Furthermore, *Baskes* actually reviewed the fraudulent returns itself claiming the bogus deductions, before it was filed. (*Baskes* at Page 170).

The participation of Baskes in the commodity straddle scheme went far beyond mere "advocacy of ideas" and constituted "direct participation". Likewise, there was direct evidence that Baskes himself (who was charged as a conspirator) knew of the underlying illegality of the straddle deductions. (*Baskes* at Page 168 and 169). In *Conforte* the panel of the Ninth Circuit, unlike here, disclaimed any ". . . complexities of the necessity of defined distinctions . . .", in reviewing the convictions. The Court of Appeals in *Conforte*, found nothing complex about the law of federal income tax requirements relating to employers. (See *Conforte* at Page 875). *Turkish* was another case involving the well-settled principles pertaining to fraudulent commodity straddles. The panel of the Court of Appeals for the Second Circuit specifically found ". . . fraudulent manipulations of prices in a commodity market . . ." in sustaining the conviction. (See *Turkish* at Page 771). *Clardy* involved already well-settled tax law principles pertaining to deduction of prepaid interest expense. Unfortunately for the Appellant in *Clardy*, the Government could prove that the prepaid interest deducted had never actually been paid. The Court of Appeals, in *Clardy* distinguished its decision from *U.S. v. Kritzer*, 498 F.2d 1160 (4th Cir. 1974) on the basis of the facts before it. As noted by the Court:

> "Counsel for *Clardy* stressed that this is a criminal prosecution rather than a civil action respecting taxes; then they argued that whether interest is paid as a tax issue not free from doubt, that there is room for honest disagreement, and that the conviction cannot be sustained because of belief that the deductions were proper was one which an informed person could hold in good faith.".

The issue of interest payment is not "highly debatable". It is simply: was the interest paid or not? See *Clardy* at Page 1152. *Freuhauf* involved understatement of an "excise tax base" which resulted in understatement of federal excise tax liability. By *Clardy* the panel of the 6th Circuit in *Freuhauf* disclaimed the presence of any novel or unique issues of tax law in affirming the convictions. There were several objectionable "schemes" in *Freuhauf*. In sustaining the convictions the Court of Appeals noted that *Freuhauf* had not refrained from its practice of excluding certain add-on charges from "the sale price upon which the tax is based . . ." even after promulgation of a specific treasury regulation governing the point. (Treasury Regulation 330.1-1[b]). Another "scheme" involved deliberate overstatement of tire purchase prices, with the attendant overstatement of tax credit resulting from the purchase. The Court of Appeals, in *Freuhauf* specifically noted that the Appellant had violated regulations directly pertinent to the considerations of "fair notice" during at least a portion of the period encompassed by the alleged conspiracy. (See *Freuhauf* at Pages 1061 and 1062). Besides the absence of such regulations here, *Freuhauf* is also distinguishable in that the District Judge entering the convictions apparently acquitted *Freuhauf* on the only charge of the Indictment where the law was found to be unclear or questionable. (*Freuhauf* at Page 1066 and 1067). In *Raub*, where a fraudulent scheme to obscure corporate profits, through real estate purchases, was unveiled, the Court of Appeals expressly noted that no funds had changed hands which could be said to have lent economic substance to the sales of trucks and tractors in subsequent purchases of real estate, between the agent and her prin-

cipals, so as to allow Appellants in that case a good faith argument that they believed the validity of the underlying deductions claimed. Also, the convicted Appellant in *Raub* had failed to make full disclosure to his tax consultant and attorney, a fact which the Court of Appeals found to be clear evidence of his intent to deceive and defraud. (See *Raub* at Page 314).

The Government admits that the uncertainty of the law may negate the specific intent inherent in willfullness. After paying lip service to this "horn-book" principle Petitioner then attempts to thwart its application to Respondent's case. *United States v. Moss,* (C.A. 8, 1979), cert. denied, 444 U.S. 1071 (1980), and *United States v. Buttorff,* 572 F.2d 619 (8th Cir.), cert. denied, 437 U.S. 906 (1978). The Court of Appeals, in *Buttorff,* specifically noted that the speech of the Defendant in that case did not result in "imminent" criminal conduct on the part of his audience, and was troubled by that fact. In any event, the advice espoused by Buttorff and Moss to their respective audiences, if followed, could have resulted in nothing *other* than criminal conduct. Such advice had no legal application. Thus, the instant case is readily distinguishable from those two decisions.

The Government admits that a speaker ". . . can not be held responsible for the remote consequences of his speech . . .". (See Petition for Writ, Page 25.) Although the Government notes that the *Brandenberg Rule* has recently been restated by this Court in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), the Government attempts to grossly distort the holding in that case. And, while noting that "the Federal Statutes directed at promoters of abusive tax shelters are predicated on the

congressional judgment that the professional advisor or salesman of a tax shelter is generally more culpable than the purchaser who may have relief on the representations as to the tax consequences of the investment.", the Government fails to point out that all new tax enforcement remedies provided to the Government under T.E.F.R.A. are civil, rather than criminal, in nature.

The Government attempts to mislead this Court into accepting its statement that *Claiborne Hardware* established a "reasonable period" within which to hold a speaker liable for the criminal conduct resulting from his speech. Such reasonable period, the Government goes on to state, is no more than "weeks or months". The Government's argument, on Page 26 of its Petition for Writ, said "unlike the flash of violence may follow an inflammatory speech, a tax evasion scheme requires time, is a thinly-disguised appeal to this Court to change the *Brandenberg* Rule. Far from approving the Government's rationale that "imminency" under *Brandenberg* could be found weeks or months after the speech in question, this Court, reversed the Mississippi Supreme Court in *Claiborne Hardware*, partially on the basis that the Judgment against Evers could not be sustained due to "lack of imminency".

Claiborne Hardware also raises other issues blithely ignored by the Government which support the holding of the Court of Appeals below. With respect to Ripley, the Government's argument assumes the illegality of the entire "tax shelter scheme". This was neither proven below nor is it supported by this Court's rationale in *Claiborne Hardware*. The premier question in cases of this type, i.e., whether Respondent's speech was the "proximate

result" of the illegal activity of his audience is not even mentioned. As reiterated in *Claiborne Hardware*, an individual can not be penalized simply for assisting in the conduct of an otherwise lawful meeting . . .". The Government failed to establish the legal elements of the "tax shelter scheme" and to separate them, by distinct evidence, from the "advocacy" which it claims resulted in the filing of false and fraudulent income tax returns. As a result of its failure the Government doomed the convictions to reversal since "the precision of regulation" envisioned in *Claiborne Hardware* requires that the speaker be punished, if at all, only for the criminal activity which the proximate result of the speech at issue. Lacking in the evidence is any indication that Ripley "established a knowing affiliation with an organization possessing unlawful aims and goals, and had a specific intent to further those illegal aims.". As noted by this Court, "Only those losses proximately caused by unlawful conduct may be recovered.".

Certainly the free dissemination of ideas in the tax planning field is as worthy a goal as the associational speech protected by this Court in *Claiborne Hardware*. The remoteness of the criminal activity, viewed in relation to the time of advocacy, along with the opportunity of the various taxpayers to consult other sources before making the final decision to file the "objectionable" return highlights the necessity for caution and restraint. Illegal acts occurring weeks or months after speech objectionable to the Government lack the sort of connection necessary to invoke the punishments of the criminal law.

Respondent Ripley was convicted for acts of "free speech". There was no evidence of his direct participa-

tion in the formulation, presentation, or filing of any income tax returns. There was no ratification, on his part, of the statements of even his co-Respondents, and they do not reflect his expressed intent.

In *Lamar Outdoor Advertising v. Mississippi Tax Commission*, 701 F.2d 314 (5th Cir., 1983), a case heavily relied upon by the Government, the Fifth Circuit held that the speech must "actively and intentionally promote or encourage illegal activity" in order to be criminalized. Even though *Lamar* involved commercial speech, the Court sounded a cautionary note that "the First Amendment guarantee of freely-flowing channels of information would be seriously eroded if information could be deprived of constitutional protection whenever a state could conclude that some people might independently choose to act on it in an unlawful manner.". The Court of Appeals closed its decision with the conclusion that a speaker's words "should not be deprived of constitutional protection unless his words are directed toward producing the unlawful response.". *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949) does not require a contrary result. In *Giboney* the *sole immediate object* of the union picketing activitity was to effect a combination in restraint of trade, a goal repugnant under both federal and state law. The Government failed in the instant case to prove that the "sole immediate object" of the American Law Association program was illegal. Thus *Giboney* has no application here.

The Government's effort to proscribe the valid exercise of First Amendment rights, in the commercial field, is reminiscent of another attempt by it, recently frustrated, to punish the exercise of a citizen's right to redress from

its public officials under the criminal law, *United States v. Hylton,* 710 F.2d 1106 (5th Cir., 1983). The Government's efforts here should be no more seriously entertained than those in *Hylton.*

NOTICE OF ADOPTION OF AUTHORITY OF CO-RESPONDENTS

Respondent, R. Bruce Ripley, hereby adopts all of the Appellate arguments of his Co-Respondents where not inconsistent with the arguments made herein.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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